

THE EVOLUTION OF THE LEGAL CONCEPT
OF ENVIRONMENTAL SEXUAL HARASSMENT OF
U.S. HIGHER EDUCATION STUDENTS BY FACULTY

By

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Ann Browning Masters

To my husband and son,
Jeremy A. Masters and Forrest J. Masters

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Abstract of Dissertation Presented to the Graduate School
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The purpose of this study was to identify and analyze the evolution of the legal concept of environmental sexual harassment of U.S. higher education students by faculty. Traditional legal research methods identified relevant federal cases and their judicial reasoning. An analysis of the cases was completed using the foci of Catharine MacKinnon's legal theory of sexual harassment as sex discrimination: the plaintiff's civil rights status, defenses against charges of environmental sexual harassment, and judicial reasoning.

The legal analysis revealed that judicial reasoning focused on the actionability of environmental sexual harassment as a civil rights violation resulting in four discernible legal periods. In the first period environmental sexual harassment was not recognized as a civil rights violation. The possibility that environmental

sexual harassment was a civil rights violation was considered in the second period. In the third period environmental sexual harassment was found to be a civil rights violation. The last period of judicial reasoning contained conflicting rulings, indicating that the concept of environmental sexual harassment as a civil rights violation depended upon the circuit in which legal action was brought and the student's employment status.

The analysis using MacKinnon's theory provided support for MacKinnon's dominance theory in higher education settings. Work setting defenses were found to be descriptive of higher education defenses, with the absence of the biological defense. Defenses of sovereign and qualified immunity, not identified by MacKinnon, emerged. MacKinnon's theory was found to be appropriate for providing understanding of the evolution of the legal concept of environmental sexual harassment of higher education students.

The evolution of this legal concept was characterized by a shift in the focus of judicial interpretation of Title IX of the Education Amendments of 1972. Initial interpretations were concerned with discrimination that denied access to admission or admission to benefits. Later interpretations acknowledged discrimination resulting in a sexually harassing environment. This resulted from the application of Title VII principles to Title IX cases.

It was recommended that educators and administrators develop an awareness of the commonalities in civil rights legislation and case law. Further research was recommended concerning Title VII/Title IX issues and MacKinnon's theory of sexual harassment as sex discrimination.

CHAPTER I INTRODUCTION

The documentation of sexual harassment of higher education students by faculty has been an area of concern for higher education administrators.¹ Higher education institutions and professional organizations have established policies prohibiting sexual harassment of students by faculty to prevent this civil rights violation.² In spite of legal and institutional prohibition of environmental sexual harassment, students continue to report sexual harassment by faculty.³

¹ Michele Paludi, ed., Ivory Power: Sexual Harassment on Campus (New York: State University of New York Press, 1990); Billie W. Dziech and Linda Weiner, The Lecherous Professor: Sexual Harassment on Campus, 2d ed. (Chicago: University of Illinois Press, 1990).

² See the institutional policies of the University of Iowa, the University of Wisconsin, the University of Washington, Harvard University, Howard University and statements of policy of the American Council of Education and the American Association of University Professors in Elsa Kircher Cole, ed., Sexual Harassment on Campus: A Legal Compendium, 2d ed., (Washington D.C.: National Association of College and University Attorneys, 1990): 179-229.

³ Mary K. Biaggio et al., "Addressing Sexual Harassment: Strategies for Prevention and Change," in Paludi, ed., Ivory Power (1990): 213-230; Dorothy O. Helly, "Institutional Strategies: Creating a Sexual Harassment Panel," in Paludi, ed., Ivory Power (1990): 231-250; Doric Little, An Investigation of the Legal Parameters of Policies Dealing With Sexual Relationships in Academe (Honolulu: University of Hawaii, 1987); Carol Olson and

Two forms of sexual harassment have been legally defined as discriminatory behavior that violates Title IX of the Education Amendments of 1972.⁴ Quid pro quo sexual harassment occurs when sexual demands are made in exchange for educational participation, advancement, or benefits.⁵ Environmental sexual harassment occurs when the educational environment is offensive, hostile, or intimidating to a student or students of a particular sex.⁶ In 1986 the Supreme Court provided a legal definition and remedy for environmental sexual harassment in a Title VII employment case⁷ that has since been referenced at the federal

Kathleen McKinney, "Processes Inhibiting the Reduction of Sexual Harassment in Academe: An Alternative Explanation," Initiatives 52, no.3 (Fall 1989): 7-13.

⁴ 20 U.S.C. § 1681(a). It is required by Title IX that:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination [emphasis added] under any academic, extracurricular, research, occupational, training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

Guidelines on Sexual Harassment, 34 C.F.R. § 106.31 (1988); see also Pub.L. No. 100-259, § 3(a) (1988).

⁵ Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980).

⁶ Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986).

⁷ Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

judicial level in a student-employee environmental sexual harassment Title IX case.⁸

The difficulty of understanding and establishing environmental sexual harassment as legally actionable was recognized in 1979 by Law Professor Catharine A. MacKinnon, a pioneer in the development of the theory of sexual harassment as sex discrimination.⁹ Comparing environmental sexual harassment as a condition of work to *quid pro quo* sexual harassment, she stated:

when sexual harassment occurs as a condition of work (environmentally), it does not require compliance. . . . [S]o long as a supervisor has the power to force sexual attention by adopting forms of sexual expression that do not require compliance—a woman would be precluded from legal action or other complaint because she had not properly "refused." . . . [T]o require a rejection amounts to saying that no series of sexual advances alone is sufficient to justify legal intervention until it is expressed in the *quid pro quo* form . . . that a constant sexual molestation (from the environment) would not be injury enough to a woman or her employment status until the employer retaliates against her job. . . . [S]o long as the sexual situation is constructed with enough coerciveness, subtlety, suddenness, or one

⁸ *Lipsett v. University of Puerto Rico*, 864 F. 2d 881 (1st Cir. 1988).

⁹ "Law professor Catherine MacKinnon pioneered the tenet that sexual harassment in the work place was a form of illegal sexual discrimination. The U.S. Supreme Court adopted this approach in 1986 when it decided its only sexual harassment case, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49," *The Guide to American Law Supplement 1990*, (New York: West Publishing Co.): 243-244. "A Doctor of Laws Degree was awarded to Catharine A. MacKinnon, a law professor who pioneered the legal theory defining sexual harassment as an actionable form of sex discrimination." Haverford College Commencement, New York Times, Monday, May 20, 1991, A13.

sidedness . . . while her job is formally undisturbed, she is not considered to have been sexually harassed. [emphasis added]¹⁰

Her argument that environmental sexual harassment constitutes legally actionable sexual harassment was accepted by the Supreme Court in Meritor Savings Bank, FSB v. Vinson in 1986.¹¹

The concept of environmental sexual harassment does not appear as settled at law or fully comprehended in academe as quid pro quo harassment. Despite the statutory and judicial prohibition of sexual harassment of students, quid pro quo and environmental sexual harassment continue to be reported anecdotally¹² and in court cases.¹³ Quid pro quo sexual

¹⁰ Catharine MacKinnon, Sexual Harassment of Working Women: A case of Sex Discrimination (New Haven: Yale University Press, 1979): 46-47.

¹¹ 477 U.S. 57 (1986). See also Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987): 103. Holly B. Fechner, "Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts," Journal of Law Reform 23, no.3 (Spring, 1990): 476.

¹² Billie W. Dziech and Linda Weiner, The Lecherous Professor, 2d ed.(Chicago: University of Illinois Press, 1990); Jane Dozier, "Sexual Harassment: It Can Happen Here," AGB Reports 32, no.1 (Jan.-Feb. 1990): 15-20; N. Maihoff and L. Forrest, "Sexual Harassment in Higher Education: An Assessment Study," Journal of National Association of Women Deans, Administrators and Counselors(NAWDAC) 42, no.2 (Summer 1983): 3-8; Naomi McCormick et al., "Sexual Harassment of Students at a Small College," Initiatives 52, no. 3 (Fall 1989): 7-14; Michele A. Paludi, ed., Ivory Power: Sexual Harassment on Campus, (New York: State University of New York Press, 1990); M. D. Smith, "Must Higher Education Be a Hands On Experience? Sexual Harassment by Professors," West's Education Law Reporter 28, 693-707.

harassment has been found to be sufficient cause for dismissal from tenured faculty positions.¹⁴ To date, no environmental sexual harassment case brought by a higher education student has been found actionable.¹⁵

Researchers have indicated that the theoretical concept of sexual harassment is not understood in the same way by all parties.¹⁶ Discrepancies have also been observed in higher education in what faculty and students term sexually

¹³ *Bougher v. University of Pittsburgh*, 108 S. Ct. 460 (1987), cert. denied, 713 F. Supp. 139 (W.D. Pa.), aff'd, 882 F.2d 74 (3d Cir. 1989); *Korf v. Ball State Univ.*, 726 F.2d 1222 (7th Cir. 1984); *Lipsett v. University of Puerto Rico*, 576 F. Supp. 1217 (D.P.R. 1983); *Lipsett v. University of Puerto Rico*, 637 F. Supp. 789 (D.P.R. 1986); *Lipsett v. Rive-Mora*, 669 F. Supp. 1188 (D. P. R. 1987); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Naragon v. Wharton*, 572 F. Supp. 1117 (M.D. La. 1983), aff'd, 737 F.2d 1403 (5th Cir. 1984); *Levitt v. University of Texas at El Paso*, 759 F.2d 1224 (5th Cir. 1985), cert. denied, 106 S. Ct. 599 (1986).

¹⁴ *Levitt*, 759 F.2d 1224 (5th Cir. 1985), cert. denied, 106 S. Ct. 599 (1986); *Korf v. Ball State Univ.*, 726 F.2d 1222 (7th Cir. 1984); *Naragon v. Wharton*, 572 F. Supp. 1117 (M.D. La. 1983), aff'd, 737 F.2d 1403 (5th Cir. 1984); See also Dziech and Weiner, *ibid.*, for a discussion of institutional and judicial sanctions imposed for sexual harassment of students, 19-37.

¹⁵ Sandra Shullman and Barbara Watts, "Legal Issues" in Michele A. Paludi, ed., *Ivory Power*, 258-261. Ronna Schneider, "Sexual Harassment," 539-542.

¹⁶ Louise A. Fitzgerald, "Sexual Harassment: The Definition and Measurement of a Construct," in Michele A. Paludi, ed., *Ivory Power*, 21-44; Elisabeth A. Keller, "Consensual Amorous Relationships," Schneider, "Sexual Harassment."

harassing,¹⁷ particularly subtle behaviors not accompanied by a demand to acquiesce sexually or lose an educational benefit.¹⁸ These findings were consistent with a study of Title VII sexual harassment charges that found environmental sexual harassment charges of offensive language and remarks, unlinked propositions, date requests, and unwanted nonverbal attention to have less definitional consensus as harassment, thereby resulting in less favorable settlements for the complainant than quid pro quo cases.¹⁹

The Purpose of the Study

The purpose of this study was to identify and analyze the evolution of the legal concept of environmental sexual harassment of higher education students by faculty, using a theoretical legal framework provided by MacKinnon concerning power, sex discrimination, and civil rights. The analysis of the evolution of this legal concept was intended to provide an increased understanding of how and why the law

¹⁷ Fitzgerald, "Sexual Harassment;" Louise A. Fitzgerald and Laureen Weitzman, "Men Who Harass: Speculation and Data," in Michele A. Paludi, ed., Ivory Power, 125-140; Sue Rosenberg Zalk, "Men in the Academy: A Psychological Profile of Harassment," in Michele A. Paludi, ed., Ivory Power, 141-175.

¹⁸ Lynne Carroll and Kathryn L. Ellis, "Faculty Attitudes Toward Sexual Harassment: Survey Results, Survey Process," Initiatives 52, no.3 (Fall 1989): 35-42; McCormack et al., "Sexual Harassment;" Truax, "Sexual Harassment."

¹⁹ David E. Terpstra and Douglas D. Baker, "Outcomes of Sexual Harassment Charges," Academy of Management Journal 31, no.1, 185-194.

concerning this concept has evolved. The following questions were addressed:

1. Is the development of the legal concept of environmental sexual harassment, as related to higher education students, consistent with theories of power and civil rights developed by MacKinnon for other settings?

2. Have the defenses against charges of environmental sexual harassment, as related to higher education students, evolved from defenses against environmental sexual harassment previously categorized by MacKinnon for other settings?

3. Has the judicial legal reasoning concerning charges of environmental sexual harassment, as related to higher education students, evolved from judicial legal reasoning concerning environmental sexual harassment previously categorized by MacKinnon for other settings?

The Background of the Study

The significant differentiation between the two forms of sexual harassment is that, in the case of environmental sexual harassment, there is no actual loss, or implied threat of loss, of educational benefits.²⁰ While the

²⁰ In *quid pro quo* sexual harassment "it is the deprivation of 'educational benefits' which, once proven, allows the court to afford relief." Alexander, 631 F.2d at 184. See also Ronna G. Schneider, "Sexual Harassment and Higher Education," Texas Law Review 65 (1987): 525-583; and Sandra Schullman and Barbara Watts, "Legal Issues," in Ivory Power: Sexual Harassment on Campus, Michele A. Paludi, ed., (New York: State University of New York Press, 1990): 251-263. For a discussion of legal parameters of faculty right

definitions of both forms of sexual harassment require that the harassing behavior or conditions are considered unwelcome by the student,²¹ rejection of or notice of the offensiveness of the conditions in environmental sexual harassment cases does not cause the student to be removed from the educational environment or lose specific educational benefits.²² Therefore, the following can occur in either type of sexual harassment: generalized stereotypical statements, printed material, pictures, or jokes; inappropriate remarks about a student's clothing, body, or sexual activities; unnecessary touching, patting, or brushing against a student's body; nonverbal behavior such as leering or ogling at a student's body; and subtle requests for sexual activity.²³

As with case law concerning sexual harassment in work settings, quid pro quo sexual harassment in higher education

to privacy and student right to freedom from sexual harassment, see Elisabeth A. Keller, "Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy," Journal of College and University Law 15 (1988): 21-42.

²¹ "This distinction is essential because sexual conduct becomes unlawful only when it is unwelcome." Cole, Sexual Harassment on Campus: A Compendium, 143.

²² This differentiation was established by the Moire court (613 F. Supp. at 1367) using definitions of sexual harassment that were developed by the Equal Employment Opportunity Commission (EEOC) [29 C.F.R. § 1604.11 (1980)] for Title VII sexual harassment charges.

²³ Billie W. Dziech and Linda Weiner. The Lecherous Professor, 2d ed. (Chicago: University of Illinois Press, 1990): 22.

settings was recognized as legally actionable earlier than environmental sexual harassment in higher education settings. In 1980, when a female student claimed to have received a lower grade for noncompliance with an instructor's sexual demands, the Second Circuit federal appellate court ruled in Alexander v. Yale University that quid pro quo sexual harassment was legally actionable in educational environments.²⁴ However, claims by other students in the same case concerning an atmosphere allegedly condoning sexual harassment were not held by the court to be actionable.²⁵ The appellate court affirmed that "no judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong."²⁶

This decision not to consider the reduction of educational benefit from an alleged harassing environment has been criticized by Schneider:

The court's refusal to recognize maintenance of an offensive educational environment as sexual harassment under Title IX ignores a critical element of learning in any educational institution--the creation and fostering of an environment conducive to intellectual growth. The academic environment existing at an educational

²⁴ 459 F. Supp. 1, aff'd 631 F.2d 178.

²⁵ "Their alleged injuries are too speculative. . . . What harm she has suffered as a result is not specified." Alexander, 631 F.2d at 185. "[W]e do not believe that such a possibility warrants judicial scrutiny, particularly when the alleged injury is so uncertain." Id. at 184.

²⁶ Id.

institution is extremely important in determining the benefit that a student receives from attending that institution. Any diminution or pollution of that academic environment is, therefore, a reduction in the educational benefit that student receives.²⁷

In 1985 the "imponderables" of sexual harassment as an effect of the educational environment were ruled on by the Third Circuit in Moire v. Temple University School of Medicine.²⁸ Citing Alexander, the court stated that sexual harassment "demeans and degrades women."²⁹ The Moire court held that "abusive environment" sexual harassment was another actionable form of sexual harassment.³⁰ The court ruled that "Harassment from abusive environment occurs where multiple incidents of offensive conduct lead to an environment violative of a victim's civil rights."³¹

The Moire court recognized definitions of sexual harassment that were developed by the Equal Employment

²⁷ Schneider, "Sexual Harassment," 540.

²⁸ 613 F. Supp. 1360 (E.D. Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986).

²⁹ 613 F. Supp. at 1366. Note, however, that sexual harassment can be directed to either sex. "Nationally, about 95 percent of all sexual harassment reports involve men harassing females." Anne Truax, "Sexual Harassment in Higher Education: What We've Learned," Thought and Action 5, no. 1, 25.

³⁰ 613 F. Supp. at 1366.

³¹ Id.

Opportunity Commission (EEOC).³² The EEOC 1980 Guidelines on Sexual Harassment were used in cases concerning sex discrimination in employment settings and provided guidance in the enforcement of Title VII of the Civil Rights Act of 1964.³³ The court stated, "Though the sexual harassment 'doctrine' has developed in the context of Title VII, these guidelines seem equally applicable to Title IX."³⁴

In the recent case of Lipsett v. University of Puerto Rico,³⁵ the First Circuit Court ruled on a hostile environment and quid pro quo case brought by a female participant in a university medical school surgical residency program. The court chose to view this case as concerning employment discrimination in an education setting. The court reasoned:

our present holding--that the Title VII standard for proving discriminatory treatment should apply to claims of sex discrimination arising under Title IX--is limited to the context of employment discrimination. Plaintiff here was both an employee and a student in the program [emphasis added]. In addition to receiving a salary, she was receiving training [emphasis added].³⁶

The court did not acknowledge the nexus of attending medical surgical training and being a medical resident. The

³² 613 F. Supp. at 1367. See 29 C.F.R. § 1604.11 (1980).

³³ 42 U.S.C. § 2000e2(a)(1).

³⁴ Moire, 613 F. Supp at 1367.

³⁵ 864 F.2d 881.

³⁶ Id. at 897.

General Surgery Residence Training Program was defined as a five-year training program that integrated the training programs of the San Juan Veterans Administration Hospital and the University of Puerto Rico Department of Surgery.³⁷ The fact that training status was required was not addressed.

The Lipsett court frequently cited Meritor Savings Bank, FSB v. Vinson,³⁸ a work setting environmental sexual harassment case, in its analysis of alleged environmental sexual harassment. The Lipsett court decisively focused on the employment aspect of the student's relationship with the university, in spite of references to the defendants as "physicians and teachers"³⁹ and reviewing evidence that indicated that the plaintiff "was performing academically at a level well above average."⁴⁰

Moire and Lipsett reflect the influence of Title VII standards in Title IX higher education sexual harassment cases. Inherent in the previously reported Title VII and

³⁷ "The trainees perform under the guidance and supervision of the participating faculty and those residents who have reached a higher position in the five-year hierarchy." Id. at 886. That participants were considered in training is illustrated by reference to attending doctors: "An attending is a fully trained doctor [emphasis added] who is in charge of supervising the residents." Id. at 888.

³⁸ 477 U.S. 57 (1986).

³⁹ 864 F.2d at 909.

⁴⁰ Id. at 903.

Title IX litigation is the concept of sexual harassment as sex discrimination. The legal grasp of this concept was not immediate in the development of civil rights legislation:

The prohibition against discrimination based on sex was added to Title VII at the last minute on the Floor of the House of Representatives. 110 Cong. Rec. 2577-2584 (1964). . . . [T]he bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."⁴¹

MacKinnon has cited the variable of unequal power between supervisors and employees as contributing to gender differences in perceptions of harassing behavior in work settings, proposing that work environments reflect generally the less powerful social status of women.⁴² The variable of unequal power has also been addressed by McCormack in research on the unequal power inherent in student-faculty interaction.⁴³ McCormack theorized that the first unequal power relationship experienced by male and female students was the parental relationship. She reasoned that students come from unequal, but legitimate, power relationships ready to acquiesce to the unequal, but legitimate, authority of faculty. Echoing MacKinnon's theory of the use of a legitimate, unequal power for sexual harassment, she stated

⁴¹ Meritor, 477 U.S. at 62.

⁴² MacKinnon, Sexual Harassment, 1-3.

⁴³ Arlene McCormack, Harassment, Sexual or Otherwise: The Role of Devaluation in Student-Teacher Interaction (Boston: Boston University Graduate School, 1981): 38-45, 67-88, 106-43.

"the initiating of sexual demands can leave the student unsure of the teacher's reaction to a refusal."⁴⁴

(National reports of 95 percent of sexual harassment directed from males to females⁴⁵ lend support to MacKinnon's theory of the less powerful status of women.)

The unequal power relationship has been cited repeatedly in higher education sexual harassment research.⁴⁶ Levels of student dependence on faculty power have been studied by Scott.⁴⁷ She found a significant difference in the higher amount of sexual harassment experienced by female graduate students in highly dependent faculty relationships, compared to a lower incidence of sexual harassment reported by female graduate students in relationships of slight dependence. The most reported experiences of harassment were anti-female remarks, leering, and ogling (56%); requests for sexual activity (23%); and touching (21%). Responses in the comments section of her

⁴⁴ McCormack, Harassment, 184.

⁴⁵ Truax, "Sexual Harassment," 1.

⁴⁶ Dziech and Weiner, Lecherous Professor; Vita C. Rabinowitz, "Coping with Sexual Harassment," in Paludi, ed., Ivory Power, 103-118; Zalk, "Men in the Academy," in Paludi, ed., 141-175.

⁴⁷ Deborah D. Scott, Sexual Harassment Behaviors, Management Strategies, and Power Dependent Behavior Among a Female Graduate Student Population (Muncie, Ind.: Ball State University, 1983).

survey included remarks on the "pervasive, subtle sexism that is part of university life."⁴⁸

The professional power of faculty is also a well-grounded legal reality. The concept of academic freedom--*lehrfreiheit* and *lernfreiheit*--was developed in nineteenth century German universities as a protection from state interference in the pursuit of knowledge. Illustrating its development in the United States, Kaplin⁴⁹ stated,

In a series of leading cases in the 1950s and 1960s, the U.S. Supreme Court gave academic freedom Constitutional status under the First Amendment freedoms of speech and association, the Fifth Amendment protection against self-incrimination, and the Fourteenth Amendment of due process. The opinion in these cases included several ringing declarations of the importance of academic freedom.

Mr. Justice Frankfurter's concurring opinion in Sweezy v. New Hampshire 354 U.S. 234 (1957) [is one of these declarations]: "It is the business of the university to provide that atmosphere which is most conducive to speculation, experiment, creation. It is an atmosphere in where there prevail the four essential freedoms of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

The evolution of law directed toward the misuse of power that results in sex discrimination has paralleled the

⁴⁸ Scott, Sexual Harassment, 66. (This study was completed before the Moire case defined and made actionable environmental sexual harassment. Note that over half of the reported harassing behaviors could be considered environmental sexual harassment.)

⁴⁹ William A. Kaplin, The Law of Higher Education 2d ed. (San Francisco: Jossey-Bass, 1989): 181, 260.

development of case law and legislation against race discrimination.⁵⁰ The understanding that has informed the evolution of civil rights law is that oppression, unequal treatment, and inequality can exist even after blatant misuse of power has been legally prohibited.⁵¹ This understanding has led to efforts to secure judicial language prohibiting the creation of hostile, intimidating, or offensive environments as further relief for sex discrimination in Title VII and Title IX cases.⁵²

⁵⁰ "The primary point of reference for antidiscrimination law has not been the social situation and experience of women, but that of black Americans, or at least black men . . . the law against discrimination has emerged in response, however inadequate, to demands by black people for legal equality as a means to social equality. . . . The black experience has shaped what the concept of discrimination means." MacKinnon, Sexual Harassment, 127-128.

⁵¹ This was a concern of W. E. B. DuBois when considering the possible effects of the legal abolition of school segregation. He feared a black person may have to "send his own helpless, immature child into school where white children may kick, cuff, or abuse him, or where a teacher may openly neglect or hurt or dwarf his soul." W. E. B. DuBois as cited by Mark V. Tushnet in The NAACP's Legal Strategy Against Segregated Education, 1925-1950 (Chapel Hill: University of North Carolina Press, 1987): 10.

⁵² "In concluding that so-called 'hostile environment' harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords the right to work in an environment free from discriminatory intimidation, ridicule, and insult. . . . Courts applied this principle to harassment based on race . . . Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not likewise be prohibited." Meritor, 477 U.S. at 63. "[P]laintiff never accused Dr. Crabtree of attempting physical contact, soliciting sexual intimacies or threatening her with failure to obtain sexual favors. The

The Theoretical Framework of the Study

The theoretical background of the study is provided by MacKinnon's development of legal theory proposing that sexual harassment was sex discrimination, a violation of civil rights. Prior to MacKinnon's development of this theory, jurisprudence was characterized by what MacKinnon termed the "dominance" theory, meaning that law was enacted and interpreted from the viewpoint of the socially dominant gender.⁵³ MacKinnon suggested "difference" and "inequality" theories to allow the civil harm of sexual harassment to be defined and recognized judicially.⁵⁴

The difference theory proposed that social and biological differences between the sexes should not allow for different treatment of the sexes based on inaccurate, preconceived, or stereotypic perceptions of the sexes. The inequality theory argued that the social inequality of the sexes should not allow different treatment of the sexes which subordinated one sex to another.⁵⁵ Both theories

issue is whether plaintiff because of her sex was in a harassing or abusive environment." *Moire*, 613 F. Supp. at 1367. "[W]e give in detail the plaintiff's description of the behavior of various men not named as defendants . . . because it supports the plaintiff's position that the atmosphere in the Program was so charged with animus toward her and other women that it could be found that at least two of the named defendants . . . were on constructive notice of this hostile environment." *Lipsett*, 864 F.2d at 886.

⁵³ MacKinnon, Sexual Harassment, 5.

⁵⁴ *Ibid.*, 4-5.

⁵⁵ *Ibid.*

suggested that different treatment based on sex was discrimination.

The underlying issue of power was identified by MacKinnon as the determinant of the outcome of cases charging sexual harassment.⁵⁶ Dominance theory recognized the defense that sexual harassment was not a violation of civil rights. Difference and inequality theory recognized the viewpoint of the plaintiff that different treatment based on sex was a violation of civil rights. When MacKinnon began her theory development, plaintiffs bringing charges of sexual harassment lacked legal power to state a claim. The final recognition of the courts of the civil right to freedom from sex discrimination in the form of sexual harassment affirmed MacKinnon's belief that "sexual harassment is less an issue of right and wrong than an issue of power."⁵⁷

Justification of the Study

The documentation of sexual harassment of higher education students by faculty and the legally defined opportunities for relief from such behavior continue to be areas of concern for higher education administrators.⁵⁸ It has been cautioned from within academe that, concerning

⁵⁶ MacKinnon, Feminism Unmodified, 07.

⁵⁷ MacKinnon, Sexual Harassment, 173.

⁵⁸ Dzeich and Weiner, Lecherous Professor; Paludi, ed., Ivory Power.

sexual harassment, an individual institution that "refuses to define acceptable professional conduct may be open to the charge that it lacks professional judgment."⁵⁹ From without academe, administrators have been informed that "Sexual harassment law is still evolving under both Title VII and Title IX."⁶⁰ A recent illustration of the progressive nature of this evolution is found in a precedent setting district court ruling for the plaintiff in a work setting environmental sexual harassment case, *Robinson v. Jacksonville Shipyards, Inc. et al.*⁶¹ This case was significant for its inclusion of explicit photographs as environmental sexual harassment, the prohibition of sexually oriented jokes or gestures directed to employees who have indicated they were unwelcome, and the requirement of educational programs on sexual harassment for all shipyard employees.

Caldwell cited Curcio in recommending that "educators need to know the legal structure under which they perform their duties."⁶² The contributions of this study are

⁵⁹ Doric Little and John A. Thompson, "Campus Policies, the Law, and Sexual Relationships," Thought and Action 5, no.1 (Spring 1989): 17-23.

⁶⁰ Alison Wetherfield, "Sexual Harassment: The Current State of the Law Governing Educational Institutions," Initiatives 52, no.4 (Winter 1990): 23-27.

⁶¹ 760 F. Supp. 1486 (M.D. Fla. 1991).

⁶² M. Theresa Caldwell, Virginia Principals and School Law (Blacksburg, Va.: Virginia Polytechnic Institute and State University, 1986): 6.

intended to be helpful to administrators who will benefit from a theoretical understanding of the full application and practice of gender-related civil rights for students in U.S. higher education.

Critical legal commentary indicates a "ripeness" for a landmark U.S. Supreme Court decision concerning environmental sexual harassment of higher education students by faculty.⁶³ Therefore, the current study is justified as an attempt to contribute new knowledge concerning the evolution of environmental sexual harassment law through a theoretical expansion of how and why the law has evolved. It is anticipated that the legal theory developed by MacKinnon for other settings will be useful for understanding the evolution of higher education sexual harassment law and for anticipation of further legal change in this area.

⁶³ W. B. Connolly and A. B. Marshall, "Sexual Harassment of University or College Students by Faculty Members," Journal of College and University Law 15, no.4, 381-403; Bonnie Lu Fritz, Legal Decisions Concerning American Institutions of Higher Education and Dismissal of Faculty During the 1980s (University of Southern Mississippi, 1988): 23-30, 59-62; E. D. Ingulli, "Sexual Harassment in Education," Rutgers Law Journal 18, no.2, 281-325; Elisabeth A. Keller, "Consensual Amorous Relationships Between Faculty and Students," Journal of College and University Law 15, no.1, 21-42; J. B. Langevin and T. C. Kayser, "Sexual Harassment in Educational Institutions," Trial 6, 29-33; M. D. Vhay, "The Harm of Asking: Towards a Comprehensive Treatment of Sexual Harassment," University of Chicago Law Review 55, 328-362.

Method of the Study

The traditional methodology of legal research was used by this researcher to identify judicial reasoning concerning established legal principles and their application in relevant higher education sexual harassment cases. This procedure involved identifying controlling statutes and constitutional amendments. A list of relevant federal cases was then compiled using legal finding tools. A legal analysis of the judicial reasoning in these cases was then completed.

Using MacKinnon's theoretical legal framework concerning power, civil rights, and sex discrimination, an analysis was completed of all reported federal cases of sexual harassment brought against higher education faculty by students from the establishment of Title IX of the Education Amendments of 1972⁶⁴ through the end of the 1990-1991 Supreme Court session. Each case was analyzed in comparison to MacKinnon's theoretical categorizations of (a) the civil rights status of the plaintiff bringing charges of sexual harassment, (b) the defenses used against charges of sexual harassment, and (c) the approach of judicial legal reasoning used in rulings on charges of sexual harassment.⁶⁵

⁶⁴ 20 U.S.C. § 1681(a) (1972).

⁶⁵ MacKinnon, Sexual Harassment.

These analyses identified the evolution of the legal concept of environmental sexual harassment of higher education students by faculty. A synthesis of the analyses was completed to determine the appropriateness of MacKinnon's theory for providing understanding of this evolution.

Definition of Terms

The primary source consulted for the definition of all legal terms used in this study was Black's Law Dictionary.⁶⁶ The following definitions of the terms "action," "actionable," "cause of action," and "sexual harassment" are quoted from this source.⁶⁷ Definitions used from other sources have been cited separately in the narrative.

Action indicates conduct, behavior; something done; the condition of acting; an act or a series of acts.

Actionable refers to the appropriateness of events that furnish legal ground for an action.

Cause of action refers to facts which give a person a right to judicial redress or relief from another; a situation or a state of facts which would entitle a party to sustain action and give the right to seek a judicial remedy.

⁶⁶ Black's Law Dictionary 6th ed. (St. Paul, Minn.: West Publishing Co., 1990).

⁶⁷ *Ibid.*, at 28, 29, 221, 1375.

Sexual harassment includes sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature prohibited by federal law. There are two forms of sexual harassment: quid pro quo and environmental.

Environmental sexual harassment refers to a form of sex discrimination that occurs when the environment is offensive, hostile, or intimidating to a person or persons of a particular sex. The harassment must be severe or pervasive enough to alter or interfere with the environment in order to be actionable.

Quid pro quo sexual harassment is a form of sex discrimination that occurs from the conditioning of advancement or benefits to submission to sexual demands.

Title VII of the Civil Rights Act of 1964 is the statute that prohibits disparate treatment of employees on the basis of sex. The Act states:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.

Title IX of the Education Amendments of 1972 is the amendment to the Higher Education Act of 1965 that prohibits discrimination on the basis of sex. The Act states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.

Limitations

Legislation and case law were reviewed from the establishment of Title IX of the Education Amendments of 1972 through the 1990-1991 Supreme Court session. The review of case law was drawn only from reported federal cases and did not deal with state cases.

Organization of the Study

In Chapter II a literature review on topics that provide the background for the rationale and research of the study is presented. A review of the incidence and effect of environmental sexual harassment concerning U.S. higher education students is included. Power theories related to sexual harassment are discussed. Also included is a comprehensive summary of the legal definition of sexual harassment as sex discrimination covering Fourteenth Amendment rights, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and case law providing quid pro quo and environmental sexual harassment definitions. Finally, MacKinnon's theory of sexual harassment as sex discrimination is presented.

The methodology of the research is described in Chapter III. The following are identified and explained: the traditional methodology of legal research; the procedure of legal analysis when applying MacKinnon's theory of sex discrimination to the data; data sources, organization, and analysis; the synthesis of data from traditional legal

research and the application of MacKinnon's theory to the data; and standards of adequacy for legal research.

Chapter IV provides an identification of relevant federal cases and an analysis of their judicial reasoning. In Chapter V an analysis of these same cases is discussed using MacKinnon's theory of sexual harassment as sex discrimination. These analyses are synthesized in Chapter VI, where conclusions concerning the research topic are developed and recommendations for further research are made.

CHAPTER II LITERATURE REVIEW

A review of the literature concerning sexual harassment provided the background for this study. This review was focused on four areas: legal definitions of sexual harassment from legislation and case law, the incidence of reported sexual harassment in higher education settings, power theories related to sexual harassment, and MacKinnon's theory of sexual harassment as sex discrimination.¹ The knowledge gained from this review makes possible an understanding of terms, concepts, and legal references used in the analysis of data in this study.

Legal Definitions of Sexual Harassment

A review of literature concerning sexual harassment revealed that case law interpretations of Section 1983 of the Civil Rights Act of 1871² and Fourteenth Amendment³ rights, Title VII of the Civil Rights Act of 1964,⁴ Title

¹ Catharine A. MacKinnon. Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979).

² 42 U.S.C. § 1983 (1871).

³ U.S. Const., amend. XIV.

⁴ 42 U.S.C. § 2000e(a).

IX of the Education Amendments of 1972,⁵ and case law interpretations of Title IX⁶ have provided legal definitions of sexual harassment as sex discrimination. It is beyond the scope of this study to discuss every legal citation referencing sexual harassment as sex discrimination. Therefore, only federal citations and sources that have referenced or contributed to the development of a legal definition of sexual harassment affecting higher education students are presented in this review.

Title VII of the Civil Rights Act of 1964

The inclusion of sex as a protected category was a stalling measure in the debate prior to the establishment of Title VII, not originally a method proposed to offer a means of eradicating sex discrimination in work settings.⁷ However, as a result of litigation brought under Title VII,

⁵ 20 U.S.C. § 1681(a) (1972).

⁶ *Moire v. Temple Univ. Sch. of Medicine*, 613 F. Supp. 1360 (E.D. Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986); *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D. Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980).

⁷ "The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577-2584 (1964). . . . [T]he bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition based on 'sex'." *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 62 (1986). See also Kimberly A. Mango, "Students Against Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972," Connecticut Law Review, 23, no.1 (Winter 1991): 363.

two categories of sexual harassment defined in Title VII Guidelines have been found to be legally actionable: quid pro quo and environmental.⁸ The Equal Employment Opportunity Commission (EEOC), the regulatory office charged with enforcement of Title VII, has defined sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment where (1) the submission to such conduct is made either explicitly or implicitly a term or a condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.⁹

Items (1) and (2) of the EEOC definition of sexual harassment refer to quid pro quo sexual harassment, where a benefit of work is conditioned to submission to sexual demands. Item (3) refers to environmental sexual harassment, where the pervasiveness of the offensive sexual conduct poisons the work environment for the victim. Since 1980 these forms of sexual harassment have been specifically prohibited.¹⁰

⁸ See *Meritor*, 477 U.S. 57; *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.C. Cir. 1976).

⁹ 29 C.F.R. § 1604.11(a) (1980).

¹⁰ See the discussion of Title VII in Elaine D. Ingulli, "Sexual Harassment in Education," *Rutgers Law Journal*, 18, no.2 (Winter 1987): 285-287; Holly B. Fechner, "Toward an

The Supreme Court case of Meritor Savings Bank FSB v. Vinson was a landmark decision affirming that tangible loss of benefit was not required for Title VII claims by employees.¹¹ This definition of environmental sexual harassment was referenced in the Title IX cases of Lipsett v. University of Puerto Rico¹² and Bougher v. University of Pittsburgh.¹³ This use of a Title VII definition of sexual harassment in recent Title IX cases closed the "open . . . issue of environmental harm"¹⁴ left by the first Title IX case alleging sexual harassment of students in higher education.¹⁵

Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts," Journal of Law Reform, 23,no.3 (Winter 1991): 475-505; Mango, "Students Versus Professors," 363-366.

¹¹ "A violation of Title VII may be predicated on either of two types of sexual harassment--(1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive work environment." 477 U.S. 58.

¹² 864 F.2d 881, 897 (1st Cir. 1988);740 F. Supp. 921, 924 (D.P.R. 1990).

¹³ Bougher v. University of Pittsburgh, 713 F. Supp. 139, 144 (W.D. Pa. 1989).

¹⁴ Susan E. Martin, "Sexual Harassment, the Link Joining Gender Stratification, Sexuality and Women's Economic Status," in Jo Freeman, ed., Women: A Feminist Perspective (Mountain View, Cal.: Mayfield Publishing Co., 1987), p. 60.

¹⁵ Alexander v. Yale Univ., 459 F. Supp. 1, aff'd, 631 F. 2d 178.

Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972¹⁶ addressed the problem of sex discrimination against students that was not recognized by the Higher Education Act of 1965.¹⁷ Using language similar to the 1964 Civil Rights Act, Title IX stated:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal assistance.¹⁸

This Congressional mandate against sex discrimination lacked explicit statutory authorization for a cause of action.¹⁹ This resulted in a Supreme Court ruling that recognized an implied cause of action for a student alleging sex discrimination.²⁰ Mango stated that this approach of Title IX is understandable in the context of a lack of litigation for sex discrimination at the time; the Supreme Court case of Meritor was fourteen years away.²¹ The Office of Civil Rights (OCR), the regulatory agency responsible for enforcing the former Department of Health,

¹⁶ 20 U.S.C. § 1681(a).

¹⁷ Pub. L. No. 89-329, 1965 U.S.C. § 1230.

¹⁸ 20 U.S.C. § 1681(a).

¹⁹ Mango, "Students Versus Professors," 376-381.

²⁰ Ibid., 376. See also Cannon v. University of Chicago, 441 U.S. 677 (1979).

²¹ Ibid., 380.

Education, and Welfare mandates, had not issued guidelines similar to the EEOC for enforcement against sex discrimination.

In 1981 the OCR issued a policy memorandum which advised that

Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employer or an agent of a recipient that denies, limits, provides, different, or conditions the provisions of aid, benefits, services or treatment protected under Title IX.²²

Regulatory guidelines similar to those issued in 1980 by EEOC concerning sexual harassment have not been issued yet by the OCR. Mango has suggested that this broadness or statutory vagueness may either allow for larger opportunity to pursue sexual harassment claims or provide "favoritism toward tangible deprivation . . . because of its bright line standard."²³ This means that, with only Title IX for guidance, the courts may choose to interpret Title IX broadly and continue to set precedent and standards concerning environmental sexual harassment, or may find quid pro quo sexual harassment as actionable more often than environmental sexual harassment because tangible loss of benefit may be more easily identified than the intangible

²² See Mango, "Students Versus Professors," 381, citing Office for Civil Rights of the Department of Education, Policy Memorandum from Antonio J. Califia, Director for Litigation Enforcement and Policy Services, OCR, to Regional Civil Rights Directors, Title IX and Sexual Harassment Complaints (August 31, 1981).

²³ Ibid., 382-383.

loss suffered in a hostile environment. In order to overcome the possible negative or unknown influence of this lack of Title IX guidelines, Mango has recommended linking student Title IX claims concerning sexual harassment to Title VII regulations and other sources of relief.²⁴

Case Law Interpretations of Title IX

Case law concerning sexual harassment of students recognized quid pro quo sexual harassment as legally actionable prior to recognizing environmental sexual harassment as legally actionable. In the first case concerning student sexual harassment, Alexander v. Yale University, the court stated,

In a Title IX suit, it is the deprivation of "educational" benefits which, once proven, allows the court to afford relief. The statute recognizes that loss of educational benefits is a significant injury, redressable by law.²⁵

This recognition of educational loss affirmed quid pro quo sexual harassment as legally actionable in education settings.²⁶

²⁴ Ibid., 384. See also Alison Wetherfield, "Sexual Harassment: The Current State of the Law Governing Educational Institutions," Initiatives, 52, no.4, (Winter 1990):23-27; Judith B. Langevin and Thomas C. Kayser, "Sexual Harassment in Education Institutions," Trial, 6, (June 1988): 29-33.

²⁵ 631 F.2d at 185.

²⁶ Regarding Alexander, "the Second Circuit established quid pro quo sexual harassment as illegal," but left "open the issue of environmental harm." Susan E. Martin, "Sexual Harassment," 71. See also Langevin and Kayser, "Sexual Harassment," 30; Margaret D. Smith, "Must Higher Education Be a Hands On Experience?" Education Law Reporter, 28, no.1,

Six years later a federal district court ruled environmental sexual harassment of students was legally actionable in Moire v. Temple University School of Medicine.²⁷ The court stated, "Harassment from abusive environment occurs where multiple incidents of offensive conduct lead to an environment violative of a victim's civil rights."²⁸

Further interpretations of Title IX liability for sexual harassment were provided in Lipsett v. University of Puerto Rico.

To make a prima facie case of quid pro quo harassment . . . the plaintiff must show that (1) he or she was subject to unwelcome sexual advances by a supervisor or teacher and (2) that his or her reaction to these advances affected tangible aspects or his or her compensation, terms, conditions or employment or educational training. . . . To make out a prima facie case of hostile environment harassment, the plaintiff must show that he or she was subjected to unwelcome sexual advances so "severe or pervasive" that it altered his or her working or educational environment.²⁹

(1986): 700-701; Walter B. Connolly, Jr. and Alison B. Marshall, "Sexual Harassment of University or College Students by Faculty Members," Journal of College and University Law, 15, no.4, (1989): 390-391; Michael D. Vhay, "The Harm of Asking: Toward a Comprehensive Treatment of Sexual Harassment," The University of Chicago Law Review, 55, (1988): 334; Ronna G. Schneider, "Sexual Harassment and Higher Education," Texas Law Review, 65, (1987): 539-541.

²⁷ 613 F. Supp. 1360 (D.C. Pa. 1985).

²⁸ Id. at 1366. For further discussion, see id. at 1366 n. 26.

²⁹ 864 F.2d at 898.

One appellate court affirmed a lower court's judgment concerning a definition of quid pro quo sexual harassment, but did not agree with the lower court's reasoning on a definition of environmental sexual harassment.

The court also rejected Bougher's contentions that the "hostile environment" theory of sexual discrimination adopted under Title VII for the workplace should apply equally to sexual discrimination in education under Title IX. . . . Although we affirm the court's ultimate judgment, we decline to adopt its reasoning in toto and we find it unnecessary to reach the question, important though it may be, whether evidence of a hostile environment is sufficient to sustain a claim of sexual discrimination in education in violation of Title IX.³⁰

Clearly, even though the case of Moire, heard four years earlier in the same circuit as Bougher, stated that evidence of hostile environment sexual harassment was sufficient to sustain a claim of sexual discrimination in education, the issue of the definition of environmental sexual harassment was not as effectively settled as the definition of quid pro quo sexual harassment.

The lower court ruling on Bougher shared the reasoning of an earlier ruling on Lipsett concerning the definition of environmental sexual harassment.

We see no reason why, at this stage, we should engage sua sponte in the complex and novel analysis of how this Title VII doctrine [regarding the Meritor definition of environmental sexual

³⁰ Bougher v. University of Pittsburgh, 882 F.2d at 74, 77 (3d Cir. 1989).

harassment] applies to this case [a Title IX case].³¹

On appeal this Lipsett decision was overturned. "At least two other courts have implied that the standards governing claims arising under Title VII and Title IX were the same. . . . We agree with this approach."³²

Section 1983 and the 14th Amendment

Section 1983 of the Civil Rights Act of 1871³³ was established to prevent abuse by state officials in depriving black citizens of their constitutional rights during the Civil War and Reconstruction.³⁴ The Equal Protection Clause of the Fourteenth Amendment guarantees equal protection under law to all citizens.³⁵ Statutory protection of equal rights under law in public educational institutions can be pursued through civil action invoking Section 1983.³⁶

³¹ Lipsett v. Rive-Mora, 669 F. Supp. 1188, 1192 (D.P.R. 1987).

³² 864 F.2d at 896.

³³ 42 U.S.C. § 1983.

³⁴ Richard C. Vacca and H. C. Hudgins, Jr., Liability of School Officials and Administrators for Civil Rights Torts (Charlottesville, Va.: The Mitchie Company, 1982): 12-13.

³⁵ U.S. Const., amend.: XIV.

³⁶ Langevin and Kaysor, "Sexual Harassment," 32. Elsa Kircher Cole, "Recent Legal Developments in Sexual Harassment," Journal of College and University Law, 13, no.3 (1986): 278-279.

The pursuit of statutory relief under law was not found to be actionable in Bougher.

Section 1983 is no more of an invitation to create expanded causes of action based on separate federal statutes than it is to create federal causes of action based on federal tort law. A statute, such as Title IX, does not permit bypassing what Congress has written by going directly to Section 1983. . . . Plaintiff cannot assert Section 1983 liability on the part of Pitt . . . unless she can identify a protected constitutional or federal substantive due process right in her right to be free of unwanted sexual advances by defendant.³⁷

In Moire and the first three opinions of Lipsett, the plaintiffs were found not to have actionable claims of violation of a civil right to be free from sexual harassment: "As we indicated in our discussion of the Title IX and Section 1983 sex discrimination and harassment aspect of her claim, this conclusory allegation is not supported by the factual contents of the record."³⁸

In the fourth opinion of Lipsett, the plaintiff was found to have established that the defendants were liable in their individual capacities of violating the plaintiff's civil rights through harassment, both quid pro quo and environmental.³⁹ Until the fourth Lipsett opinion, the establishment of a definition of environmental sexual

³⁷ 713 F. Supp. at 145-146.

³⁸ 637 F. Supp. at 813.

³⁹ 864 F.2d at 914-915.

harassment in the course of asserting a constitutional right to freedom from sexual harassment had not been successful.

In summary, the legal definition of sexual harassment applicable to higher education cases was first developed in the quid pro quo definition provided by the Alexander court. Environmental sexual harassment was first defined for the higher education setting by the Moire court. Therefore, the legal definition of environmental sexual harassment applicable to higher education settings was developed from case law concerning Title IX.

Sexual Harassment of Higher Education Students

Reports and research on student experiences of sexual harassment abound.⁴⁰ Fitzgerald has cautioned that these

⁴⁰ Judy C. Oshinsky, Sexual Harassment of Women Students (Gainesville, Fla.: University of Florida, 1980); Carmen L. Myers, Sexual Harassment in Higher Education: A Perceptual Study of Academic Women in a State University System (Tallahassee, Fla.: Florida State University, 1983); N. Maihoff and L. Forrest, "Sexual Harassment in Higher Education: An Assessment Study," Journal of National Association of Women Deans, Administrators, and Counselors (NAWDAC), 46, no.2 (1983): 3-8; Arlene McCormack, Harassment, Sexual or Otherwise: The Role of Devaluation in Student-Teacher Interactions (Boston: Boston University Graduate School, 1981); Deborah D. Scott, Sexual Harassment Behaviors, Management Strategies, and Power-Dependent Behavior Among a Female Graduate Student Population (Muncie, Ind.: Ball State University, 1983); Margaret D. Smith, "Sexual Harassment," 693-707; Liz McMillan, "Many Colleges Taking a New Look at Policies on Sexual Harassment," Chronicle of Higher Education, December 17, 1986, 1, 16; "Academy Told to Improve Its Treatment of Women," Chronicle of Higher Education, 17 October 1990, p.A-2; Anne Truax, "Sexual Harassment in Higher Education: What We've Learned," Thought and Action, 5, no.1 (1989): 25-32; Basilisa Virella, Incidence, Perception and Attitudes Toward Sexual Harassment in Higher Education (Madison: University of Wisconsin, 1989); Lisa H. Cooper, "French Teaching

reports and research lack a shared social and empirical definition, and has suggested categorizations for the analysis and integration of these data.⁴¹ Fitzgerald has also acknowledged, but not incorporated, the possible effect of the variable of contemporaneous legal developments on these categorizations.⁴² The development of a comprehensive operational construct recognizing legal and social variables of sexual harassment is beyond the scope of this review. Therefore, more appropriately, this review of reported sexual harassment of higher education students has been organized into five historic periods distinguished by relevant legislation and case law. Sources included anecdotal newspaper and journal reports, research literature, and court opinions on legal action brought by students where sexual harassment was alleged.

Program Labeled Sexist," U.: The National College Newspaper from the Amherst Student, Nov.-Dec. 1990, pp.1,7; Lynne Carrol and Kathryn L. Ellis, "Faculty Attitude Toward Sexual Harassment: Survey Results, Survey Process," Initiatives, 52, no.3, 35-42; Debra E. Blum, "Law Professor Who Was Accused of Harassment Quits at Emory U.," Chronicle of Higher Education, 10 April 1991, p.A14; Courtney Leatherman, "Stanford Neurosurgeon Decides to Remain at University but Sees Continuing Struggle Against Sex Discrimination," Chronicle of Higher Education, 18 September 1991, pp.A19-20; Lela Demby, "In Her Own Words: One Woman Student's Experience With Sexual Harassment," in Paludi, ed., Ivory Power, 183-189; Dziech and Weiner, Lecherous Professor, 1990.

⁴¹ Louise F. Fitzgerald, "Sexual Harassment: The Definition and Measurement of a Construct," in Paludi, ed., Ivory Power (1990): 21-44.

⁴² "It is possible that this is a legal issue, more than it is a scientific one." *Ibid.*, 40.

A chronological presentation provided the framework for this review. The first period began with the passage of Title IX of the Education Amendments of 1972.⁴³ The second period began in 1980 with the first federal appellate court ruling affirming actionable sexual harassment in a higher education setting, Alexander v. Yale University.⁴⁴ The third period began with the 1984 Supreme Court ruling that narrowed the channel of relief available to students in civil rights cases, Grove City College v. Bell.⁴⁵ In 1986 the fourth period began with the Supreme Court holding of environmental sexual harassment as legally actionable in work settings, in Meritor Savings Bank FSB v. Vinson,⁴⁶ and with the Third Circuit Court affirmation that environmental sexual harassment was legally actionable in higher education settings, in Moire v. Temple University School of Medicine.⁴⁷ The fifth period began with the

⁴³ 20 U.S.C. § 1681.

⁴⁴ 631 F.2d 178. This ruling established quid pro quo sexual harassment as legally actionable in education settings.

⁴⁵ 465 U.S. 555 (1984). This ruling affirmed the statutory requirement that the defendant or the defendant's teaching department, program, or activity was to be a direct recipient of federal funds. Accordingly, legal action could only be brought against persons or departments, programs or activities specifically receiving some form of federal funding. This allowed other alleged harassers and/or their programs, activities or departments freedom from litigation brought under Title IX.

⁴⁶ 477 U.S. 57 (1986).

⁴⁷ 613 F. Supp. 1360., aff'd, 800 F.2d 1136.

passage by Congress of the Civil Rights Restoration Act of 1987⁴⁸ and continued to the end of the 1990-1991 Supreme Court session.

The Education Amendments of 1972

The term "sexual harassment" was introduced a few years after the passage of the Education Amendments of 1972.⁴⁹ Lin Farley is credited with the development of the term while teaching a course on Women and Work in 1974.⁵⁰ MacKinnon has cited the Working Women United Institute as "the first to use these words as anything approaching a term of art" in 1975.⁵¹

A summary of surveys completed at eight major universities during this period has indicated that 20 to 30 percent of women students reported they were sexually harassed by male faculty. Also, a national survey of psychology educators in 1979 showed that 25 percent of those who received their degrees within the last seven years

⁴⁸ 20 U.S.C. § 1687(2)(a) (1988). This legislation expanded the previously narrow use of the term "program" defined by Grove, 465 U.S. 555, to "a college, university, or postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance" [emphasis added].

⁴⁹ Id. at note 5.

⁵⁰ Doric A. Little, An Investigation of the Legal Parameters of Policies Dealing with Sexual Relationships in Academe, (Honolulu: University of Hawaii, 1987): 21, citing Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job (New York: McGraw-Hill, 1978), xi-xii.

⁵¹ MacKinnon, Sexual Harassment, 27, 250.

reported having had sexual contact with their professors.⁵² A standard definition of sexual harassment and the same methods were not used in these studies, but the results were found to be similar.⁵³

During this first period there were reports of sexual harassment that cited "embarrassing and denigrating remarks aimed at certain women students . . . severe criticism of coursework, and hard-to-find letters of recommendation" from the rejection of professors' sexual advances.⁵⁴ A response to a pilot study requesting descriptive anecdotes of sexual harassment of higher education students resulted in "material [that] was significant enough to support a product of greater dimensions than originally envisioned."⁵⁵ During this time, though, there was no national survey on the frequency of sexual harassment of higher education students.⁵⁶

Reported responses to sexual harassment during this period indicated that students tended to handle sexual advances on their own. The tactics of avoidance, "dressing

⁵² Dziech and Weiner, Lecherous Professor, 13-14.

⁵³ Ibid., 15.

⁵⁴ Oshinsky, Sexual Harassment, 62, citing Project on the Status and Education of Women, Sexual Harassment: A Hidden Issue, Association of American Colleges, 1978, 3.

⁵⁵ Frank J. Till. Sexual Harassment: A Report on the Sexual Harassment of Students, The National Advisory Council of Women's Educational Programs, 1980, 1.

⁵⁶ Little, Legal Parameters of Sexual Harassment, 24.

down," submission, and ignoring the incident were often reported.⁵⁷ Oshinsky indicated that "the fears related to the consequences of sexual harassment have kept the problem concealed."⁵⁸ The severity of the consequences of reporting sexual harassment was often shown to make students "change their course of study, withdraw from school completely, or remain in school under immense emotional and psychological pressure."⁵⁹

Oshinsky also commented on the anecdotal nature of reported sexual harassment during this period.

There is a dearth of information in the literature that demonstrates the frequency of occurrence of incidents of sexual harassment. Most of the information . . . can be found in campus newspapers. . . . Perhaps the reason . . . is based on inadequate reporting procedures and the overwhelming possible consequences for the victim.⁶⁰

MacKinnon offered another reason for the lack of reported incidence of sexual harassment when stating,

It is not surprising either that women would not complain of an experience for which there has been no name. Until 1976, lacking a term to express it, sexual harassment was literally unspeakable, which made a generalized, shared, and social definition of it inaccessible.⁶¹

⁵⁷ Till, Sexual Harassment, 26.

⁵⁸ Oshinsky, Sexual Harassment, 67.

⁵⁹ Ibid., 62.

⁶⁰ Ibid., 60.

⁶¹ MacKinnon, Sexual Harassment, 60.

In 1977 the term "sexual harassment" was first used in a federal district court case where student plaintiffs sought as relief

(1) a declaratory judgment that Yale's policies and practices regarding sexual harassment violate Title IX and (2) an order enjoining Yale, among other duties, "to institute and continue a mechanism for receiving, investigating, and adjudicating complaints of sexual harassment, to be designed and implemented under the supervision of the district court."⁶²

The district court dismissed four of the five student plaintiffs and found that the fifth student did not have the necessary class certification nor did she prove that she was sexually harassed.⁶³ The ruling on appeal of this case begins the next period of this review. Given a time frame of eight years in this period where sex discrimination in education settings was defined as illegal, the pursuit of legal action by students reporting sexual harassment was clearly an under-used option.

Alexander v. Yale University

The appeal of the student plaintiffs in Alexander v. Yale University was dismissed.⁶⁴ However, the significance of this case was that the decision held that "if sexual harassment does occur, it may constitute sex

⁶² Alexander, 631 F.2d at 181.

⁶³ Id. at 180.

⁶⁴ Id. at 178.

discrimination."⁶⁵ The appellate court affirmed that "academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education."⁶⁶

In 1983 a federal district case concerning sexual harassment was brought by a medical student/intern against medical faculty/supervisors, the United States Veterans Administration, and the United States Government for alleged violations of the Civil Rights Act, the Fourteenth Amendment, and Title IX of the Education Amendments of 1972.⁶⁷ The court ordered that the complaint against the United States be dismissed and the motion to dismiss by the defendants was denied.⁶⁸ The plaintiff was ordered to file an amended complaint, leaving off the United States as defendant.⁶⁹ The court found the plaintiff's reference to liability under Title IX to be "based on novel interpretations of Title IX."⁷⁰ The petition was not refiled during this second period of review.

The incidence of sexual harassment continued to be remarked upon in this period. A Chronicle of Higher

⁶⁵ Michele A. Paludi et al., "Myths and Realities: Sexual Harassment on Campus," in Paludi, ed., Ivory Power, 5.

⁶⁶ Alexander, 631 F.2d at 182.

⁶⁷ Lipsett, 576 F. Supp. 1217.

⁶⁸ Id. at 1224.

⁶⁹ Id.

⁷⁰ Id.

Education article noted sexual harassment as "an increasingly visible problem."⁷¹ Dissertation topics concerning sexual harassment increased.⁷² Researchers expanded on definitional strategies concerning reports of sexual harassment.⁷³ A detailed anecdotal text outlined the incidence and varieties of sexual harassment on campuses.⁷⁴ This four-year period is significant in the transition from anecdotal mention to research attempts to categorize the concept of sexual harassment.

Grove City College v. Bell

This period began with the ruling of Grove City College v. Bell⁷⁵, narrowing liability under Title IX⁷⁶ to include only specific programs that received federal funding, not the entire institution in which the program was located. This effectively reduced the avenue for claims for relief from sexual harassment. Students who participated in

⁷¹ Lorenzo Middleton, "Sexual Harassment by Professors: An Increasingly Visible Problem," Chronicle of Higher Education, 15 September 1980, pp.1,14.

⁷² Myers, Sexual Harassment, 1980; McCormack, Harassment, 1981; Scott, Sexual Harassment, 1983.

⁷³ For a discussion of early attempts to categorize sexual harassment reports, see Fitzgerald, "Sexual Harassment," in Ivory Power, 21-44.

⁷⁴ Billie W. Dziech and Linda Weiner, The Lecherous Professor: Sexual Harassment on Campus (Boston: Beacon Press, 1984).

⁷⁵ 465 U.S. 555 (1984).

⁷⁶ 20 U.S.C. § 1681(a).

a program or activity that did not receive federal funding were not allowed to bring suits alleging sexual harassment under Title IX.

A district court case concerning alleged hostile environment sexual harassment of a higher education student was brought during this period.⁷⁷ Although the plaintiff was found not to be able to establish a claim, the court ruled that hostile environment sexual harassment in education settings was a violation of Title IX and therefore legally actionable.⁷⁸ In this case EEOC guidelines used to define sexual harassment in Title VII cases were viewed as applicable to Title IX cases.⁷⁹

The amended suit of Lipsett v. University of Puerto Rico was also ruled on during this period.⁸⁰ The court stated that the "plaintiff has still been unable to present a judicially cognizable factual framework for her claims against the UPR officials."⁸¹ As a result, claims against the UPR officials were dismissed and another court date set

⁷⁷ Moire, 613 F. Supp. 1360.

⁷⁸ Id. at 1366-1367.

⁷⁹ "The Equal Employment Opportunity Commission's (EEOC) Guidelines on Sexual Harassment explicitly recognizes these two types of harassment. See 29 CFR Ch. XIV, Part 1604, § 1604.11. . . . Though the sexual harassment 'doctrine' has generally developed in the context of Title VII, these guidelines seem equally applicable to Title IX." 613 F. Supp. at 1365-1366.

⁸⁰ 637 F. Supp. 789 (D.P.R. 1986).

⁸¹ Id. at 813.

for ruling on charges against other defendants.⁸² The previously mentioned Moire v. Temple University School of Medicine,⁸³ although decided in another federal district, was cited in Lipsett as establishing the precedent for environmental sexual harassment being legally actionable in education settings.⁸⁴

During this period the first national survey of the frequency of sexual harassment of higher education students was conducted.⁸⁵ A random sample of 568 schools resulted in the selection of one hundred universities that included the two largest universities in each state. Results confirmed previous anecdotes and non-random surveys that indicated 20-30 percent of all female students experienced some form of sexual harassment during their college career.

This period reflected less access for college students to legal remedy for sexual harassment. Sexual harassment continued to be reported and the courts indicated an understanding of relief available for quid pro quo and environmental sexual harassment.

⁸² Id.

⁸³ 613 F. Supp. 1360.

⁸⁴ 637 F. Supp. at 801.

⁸⁵ Little, Legal Parameters, 24,27, citing Claire Robertson, Constance Dyer, and D'Ann Campbell, "Report on Survey of Sexual Harassment Policies and Procedures," Indiana University, Bloomington: Office for Women's Affairs, September, 1985.

Meritor Savings Bank FSB v. Vinson

During this period the Supreme Court ruled that environmental sexual harassment was legally actionable in work settings.⁸⁶ This landmark case affirmed the EEOC guideline that "sexual harassment leading to noneconomic injury can violate Title VII."⁸⁷ This standard had previously been used in Moire, a Title IX case.⁸⁸

The student plaintiff in Moire appealed the district court's decision during this period. The appellate court affirmed the district court.⁸⁹ While the appellate court found environmental sexual harassment legally actionable in education settings, it also did not find that the student presented such a claim.

Also during this period the student/intern plaintiff of Lipsett continued to pursue action against a faculty member/supervisor of UPR. Upon Lipsett's request for reconsideration using a definition for sexual harassment provided by Meritor, the court was unwilling to consider a transfer of Title VII scope of liability to a Title IX case.⁹⁰ The court also focused liability for Title IX

⁸⁶ Meritor, 477 U.S. 57.

⁸⁷ Id. at 59.

⁸⁸ 613 F. Supp. at 1366-67.

⁸⁹ Id., aff'd, 800 F. Supp. 1136.

⁹⁰ "We see no reason why, at this stage of the proceedings, we should engage sua sponte in the complex and novel analysis of how this Title VII doctrine applies to

only at the institutional level of UPR, the recipient of federal funding as defined by Grove, and denied the liability of the Veterans Administration hospital.⁹¹ Based upon this Grove driven legal reasoning, the court found no evidence of quid pro quo or environmental sexual harassment in the work or education environment of the plaintiff.⁹²

Literature during this period concerning the incidence of sexual harassment began to focus on the legal liability incurred by sexually discriminatory behavior. McMillan indicated that many colleges were reviewing and considering policies on sexual harassment.⁹³ Schneider reflected this concern with policy and recommended that policy be used to prevent sexual harassment.⁹⁴ Critical legal commentary recognized the incidence of and liability for sexual harassment in higher education.⁹⁵ Heightened awareness

this case." 669 F. Supp. at 1192.

⁹¹ Id. at 1193.

⁹² Id. at 1204.

⁹³ Liz McMillan, "Many Colleges Taking a New Look at Policies on Sexual Harassment," Chronicle of Higher Education, 17 December 1986, pp.1,16.

⁹⁴ Beth E. Schneider, 1987, "Graduate Women. Sexual Harassment and University Policy," Journal of Higher Education, 58, no.1 (1987): 46-65.

⁹⁵ E. D. Ingulli, 1987, "Sexual Harassment in Education," Rutgers Law Journal, 18, 2, 281-325; Ronna G. Schneider, "Sexual Harassment and Higher Education," Texas Law Review, 65 (1987): 523-583; Margaret D. Smith, "Must Higher Education Be a Hands on Experience? Sexual

that liability for sexual harassment could be incurred distinguished this period.

Civil Rights Restoration Act

The Civil Rights Act of 1987, enacted March 22, 1988, stated that

The Congress finds that (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1971 {and other similar legislation . . . and (2) legislative action is necessary to restore the prior consistency and long standing executive branch interpretation and broad institution-wide application of those laws as previously administered.⁹⁶

This legislation again opened higher education institutions to liability narrowed by Grove by expanding the interpretation of program or activity to "mean all the operations of . . . a college, university, or postsecondary institution, or a public system of higher education."⁹⁷

Since this legislation, court action concerning sexual harassment has continued. The student/intern plaintiff of Lipsett appealed the 1987 ruling⁹⁸ that found no cause of action for sexual harassment charges.⁹⁹ The appellate court reversed two previous summary judgments in favor of

Harassment by Professors," Education Law Reporter, 28 (1987): 693,696.

⁹⁶ 20 U.S.C. § 1687 (Supp. 1988).

⁹⁷ Id. § 908(2) (A).

⁹⁸ 669 F. Supp. 1188.

⁹⁹ Lipsett, 864 F.2d 881.

all the defendants except one and remanded the case for a trial on its merits.¹⁰⁰ The court ruled that the plaintiff had established that the UPR could be found liable under Title IX.¹⁰¹

The jury trial of Lipsett concluded that "several of the defendants had sexually discriminated against the plaintiff."¹⁰² The jury returned an award of \$525,000.00 in favor of the plaintiff. In further court action the UPR was ruled immune from retrospective claims for damages but subject to prospective injunctive or other equitable relief.¹⁰³

In the case of Bougher v. University of Pittsburgh, the court stated that the student plaintiff failed to show any admissible evidence of quid pro quo or environmental sexual harassment.¹⁰⁴ Since the Bougher court continued to recognize Grove after the Civil Rights Restoration Act of 1987¹⁰⁵ and stated that "Title IX simply does not permit a 'hostile environment' claim,"¹⁰⁶ the significance of providing admissible evidence for hostile environment sexual

¹⁰⁰ Id. at 915.

¹⁰¹ Id. at 914-15.

¹⁰² 745 F. Supp. 793, 795 (D.P.R. 1990).

¹⁰³ Id. at 797.

¹⁰⁴ 713 F. Supp. at 145-46.

¹⁰⁵ Id. at 143.

¹⁰⁶ Id. at 145.

harassment is not clear. On appeal the court declined to rule on the hostile environment charge, holding that within the applicable limitations period the allegations did not state a claim.¹⁰⁷

Literature concerning sexual harassment since the Civil Rights Restoration Act of 1987 has focused on three areas: legal commentary and educational research focusing on the liability from reported sexual harassment,¹⁰⁸ anecdotal reports of environmental and quid pro quo sexual harassment,¹⁰⁹ and the emerging recognition of gender

¹⁰⁷ Bougher v. University of Pittsburgh, 882 F.2d 74,77 (3d Cir. 1989).

¹⁰⁸ Alison Wetherfield, "Sexual Harassment: The Current State of Law Governing Educational Institutions," Initiatives, 52, no.4, (Winter 1990): 23-27; Truax, "Sexual Harassment," 25-37; Jane Dozier, "Sexual Harassment: It Can Happen Here," AGB Reports, 32, no. 1 (Jan-Feb 1990): 15-20; Elsa K. Cole, ed., Sexual Harassment on Campus: A Legal Compendium, National Association of College and University Attorneys, 1990; M. D. Vhay, "The Harm of Asking: Toward a Comprehensive Treatment of Sexual Harassment," The University of Chicago Law Review, 55 (1988): 328-362; W. B. Connolly and A. B. Marshall, "Sexual Harassment of University and College Students by Faculty Members," Journal of College and University Law, 15, no.4 (1989): 381-403; Langevin and Kayser, "Sexual Harassment," 29-33; George A. Fuhr, The Significance of Factors in Judgments by Washington State University Faculty Regarding Levels of Sanctions Appropriate to the Sexual Harassment of Students (Spokane: Washington State University, 1989); David E. Terpstra and Douglas D. Baker, "Outcomes of Sexual Harassment Charges," Academy of Management Journal, 31, no.1. 185-194; Mango, "Students Versus Professors," 355-412.

¹⁰⁹ Leatherman, "Sex Discrimination," A19-20; "Academy Treatment of Women," A2; Cooper, "French Teaching Programs Sexist," 1,7.

differences in perception of sexually harassing behavior.¹¹⁰ This period is distinguished by the beginning of an awareness of gender differences in perception of sexual harassment and the effect of this difference on interpreting reports of sexual harassment and litigation.

Summary of Incidence of Sexual Harassment

Initial student reports of sexual harassment by faculty were mostly anecdotal or institutionally derived. In the first period identified in this review, only one report of alleged harassment in a district court case was found. A call for descriptive anecdotes of sexual harassment indicated, however, that the incidence of sexual harassment of students was greater than previously thought.

In the second period, quid pro quo sexual harassment was recognized as legally actionable in education settings through a legal action brought by students. A second student in a different judicial district also brought action alleging sexual harassment and was instructed to amend the petition and refile the case. Researchers began to focus on reports of sexual harassment in attempts to provide operational definitions of sexual harassment.

¹¹⁰ "U.S. Ill at Ease With All Male VMI," New York Times, Thursday, April 4, 1991, A-10; Mary A. Hartman, "Mills Students Provide Eloquent Testimony to the Value of Women's Colleges," Chronicle of Higher Education, 5 July 1990, p.A40; Virella, "Perception Toward Sexual Harassment," 1989; Carroll and Ellis, "Faculty Attitudes," 1989.

A third student brought legal action citing sexual harassment in the third period. This resulted in a court ruling that established environmental sexual harassment as legally actionable in education settings. The second student who had brought federal district action continued legal action seeking relief from sexual harassment. The first national survey of frequency of sexual harassment of students was completed in this period and indicated 20-30 percent of all female students experienced some form of sexual harassment.

In the fourth period, the second student to bring legal action requested a legal reconsideration of charges of sexual harassment using a standard established in a recent Supreme Court case and was denied. The third student to bring legal action appealed the district court denial of her claim and was again found not to have a claim for action, although the court did affirm that environmental sexual harassment in education settings was legally actionable. The literature concerning the reported incidence of sexual harassment focused on policy development and liability incurred through sexual harassment.

The fifth period saw continued legal action that resulted in a reversal of previous court decisions and a jury trial that provided an award of \$525,000.00 in the second student case. The court also ruled that the university had sovereign immunity from monetary damages but

not from injunctive relief. A fourth student cited sexual harassment as the cause for two legal actions against a university and one attempt at a Supreme Court hearing. Research literature began to focus on gender differences in perception of sexual harassment. Legal commentary expanded concerning liability, prevention and defenses for sexual harassment reports by students.

Clearly the reporting of sexual harassment by students has moved beyond isolated, anecdotal accounts to citation in legal action and an acknowledged influence in college and university policy. Legal action citing sexual harassment has been pursued and appealed mostly by graduate and medical students. Since generalized and research reports of sexual harassment in higher education come from all levels of students, a thoughtful reader of the literature may consider that other factors in concert with the experience of sexual harassment may move the student to pursue legal action.

Power Theories Related to Sexual Harassment

The issue of power in sexual harassment occurring in higher education can be related to the legal position ascribed to women¹¹¹ and to the role of the student. An

¹¹¹ Truax has summarized national reports of sexual harassment in higher education and has reported that 95 percent of sexual harassment is directed by men toward women. Truax, "Sexual Harassment," 25. Therefore, this discussion of the relevant issue of power reflects the experience of the majority of those experiencing it. A discussion of the power dynamics of the minority experience is beyond the scope of this study. In the review of the literature no discussion other than the statistical mention

historic example of the socially less powerful legal position of women can be found in the congressional delay in providing suffrage to women until fifty years after the recognition that suffrage was necessary for newly freed male Negro slaves to participate politically, socially, and economically in full citizenship.¹¹² More recently, executive and legislative agreement upon limits to Title VII damages claimed from discrimination based on sex differs from the availability of unlimited Title VII damage claims accorded to discrimination based on race.¹¹³ Since the majority of sex discrimination claims are known to be brought by women, the effect of this action diminishes their legal power as a group.

on this phenomenon and a legal case alleging lack of due process in termination due to harassment of a male professor toward a male student was encountered. "Sexual harassment of men is much less common and is little studied by researchers." Daniel Goleman, "Sexual Harassment: About Power, Not Sex," New York Times, October 23, 1991, B5, B8.

¹¹² The 15th Amendment of the Constitution of the United States, ratified in 1870, provided suffrage unabridged "on account of race, color, or previous condition of servitude." The 19th Amendment of the Constitution, ratified in 1920, provided suffrage unabridged "on account of sex."

¹¹³ "The compromise would allow victims of sex bias to collect compensatory and punitive damages--something current law does not permit. But while there is no limit to damages that can be awarded in race bias cases, the compromise limits money damages in cases of sex discrimination. 'It's tragic that the only way we can get a civil rights law is by guaranteeing women second-class status,' said Rep. Patricia Schroeder, D-Colo. 'Bush Accepts Compromise on Civil Rights Legislation,' Florida Times Union, 26 October 1991, p.1.

The structure of power in higher education and the opportunity it provides for harassment has been recognized.

Usually, a student, because of unequal bargaining power and the disparity in roles between a faculty member and a student, will be exploited in a sexual relationship with a professor. Even if the relationship appears to be consensual, a university may be justified in taking action against a teacher, at least when the university's purpose is to minimize the power of that teacher over the particular student [emphasis added].¹¹⁴

The power inherent in the role of professor can be theoretically explained through French and Raven's classification of six types of power: coercive, reward, referent, legitimate, expert, and informational.¹¹⁵ Each of the types of power can be attributed to and used by faculty. Etzioni has also developed the concept of expert power to explain the professional authority of faculty.¹¹⁶ The recognition of this expert and legitimate power of faculty creates "a reliance on the professor for the student's education and guidance."¹¹⁷ Legal recognition

¹¹⁴ Connolly and Marshall, "Sexual Harassment," 390-391.

¹¹⁵ "Power and Leadership," in Bernard M. Bass, Stogdill's Handbook of Leadership (New York: Free Press, 1981): 169-191.

¹¹⁶ Amitai Etzioni, "Administrative and Professional Authority," in Marvin W. Peterson, ed., ASHE Reader on Organization and Governance in Higher Education, 3d ed., (Needham Heights, Mass.: Ginn Press and Simon and Schuster, 1986), 28-35.

¹¹⁷ Margaret D. Smith, "Sexual Harassment," 700.

of the theoretical expert power of faculty has resulted in case law affirming academic freedom.¹¹⁸

Research by DeFour based on French and Raven's typology of power has indicated how the types of power manifest in sexual harassment.¹¹⁹ DeFour found that legitimate and expert power are attributed to faculty in cases reporting sexual harassment. Zalk has summarized the reasoning for attributing expert and legitimate power to faculty:

Knowledge and wisdom are power. . . . [S]uperior knowledge, and thus presumably greater wisdom, are often ascribed to faculty members by society at large. . . . The extension of the power of knowledge is often made into the realm of values and students often accept, uncritically, as true or right what the professor espouses.¹²⁰

The unequal power relationship between student and faculty member has been cited repeatedly in higher education sexual harassment research.¹²¹ MacKinnon also cited the variable of unequal power in sexual harassment of employees: "the sexual harassment of women can occur largely because

¹¹⁸ See William A. Kaplin, The Law of Higher Education 2d ed. (San Francisco: Jossey-Bass, 1989), 181, 260.

¹¹⁹ Darlene C. DeFour, "The Interface of Racism and Sexism on College Campuses," in Paludi, ed., Ivory Power, 45-52.

¹²⁰ Sue R. Zalk, "Men in the Academy: A Psychological Profile of Harassment," in Paludi, ed., Ivory Power, 143-175.

¹²¹ Dziech and Weiner, Lecherous Professor, 1990; Paludi, ed., Ivory Power, 1990; Scott, Sexual Harassment, 1983; McCormack, Harassment, 1981, 38-45, 67-88, 106-143

women occupy inferior job positions and job roles."¹²²

MacKinnon also recognized the legal and legitimate power of employers: "American society legitimizes . . . employers' control of workers."¹²³

MacKinnon developed the concept of sexual harassment as an abuse of legitimate power in work settings.

Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivation in another.¹²⁴

The transference of MacKinnon's concept of sexual harassment as a power issue concerning employees to a power issue concerning students is supported theoretically by an understanding of the concept of sexual harassment. Goleman cited extensive research indicating that sexual harassment concerns the issue of power and is used as a tactic of control.¹²⁵ MacKinnon recognized this in the development of the legal theory that sexual harassment was sex discrimination: "sexual harassment is less an issue of right and wrong than an issue of power."¹²⁶

¹²² MacKinnon, Sexual Harassment, 1979, 10.

¹²³ Ibid., 1.

¹²⁴ Ibid.

¹²⁵ Goleman, "Sexual Harassment," B5,B8.

¹²⁶ MacKinnon, Ibid., 173.

Support for the transference of a power theory concerning sexual harassment in work settings to a study concerning sexual harassment in education settings has been provided by Mango: "Using this formula [sexual harassment as an issue of power], anywhere the structures of unequal power exist, so, too, exists the potential for harassment."¹²⁷ Mango argued that students and employees can both be victims of a legitimately occurring power imbalance that has the potential for abuse to each in the form of sexual harassment.¹²⁸

Other researchers in higher education have recognized the concept of power in sexual harassment.¹²⁹ Oshinsky stated, "Sexual harassment is an issue of power. The power related in the student-teacher relationship is obvious."¹³⁰ Therefore, it would seem MacKinnon's theory of sexual harassment in work settings is a valid theory for exploration of sexual harassment in education settings. The transfer of legal guidelines concerning sexual harassment

¹²⁷ Mango, "Students Versus Professors," 357-358.

¹²⁸ Ibid., 358.

¹²⁹ Dziech and Weiner, Lecherous Professor; Paludi, ed., Ivory Power.

¹³⁰ Oshinsky, Sexual Harassment, 61.

from work to education settings has already been incorporated into case law.¹³¹

MacKinnon's Theory of Sex Discrimination

Law Professor Catharine A. MacKinnon has been cited as "the law's most prominent feminist legal theorist" due to her influence in the areas of sexual harassment and pornography.¹³² Recognition of her contributions to these areas was not immediate.¹³³ Recently, however, she has become known as the "law professor who pioneered the legal theory defining sexual harassment as an actionable form of sex discrimination."¹³⁴ This review does not include a discussion of MacKinnon's legal theory concerning pornography but instead is focused on MacKinnon's theory of sexual harassment as sex discrimination.

¹³¹ "Though the sexual harassment 'doctrine' has generally developed in the context of Title VII [directed to work settings], these guidelines seem equally applicable to Title IX [directed to education settings]." Moire, 613 F. Supp. at 1367.

¹³² Fred Strebeigh, "Defining Law on the Feminist Frontier," New York Times Magazine, 6 October 1991, section 6, pp.29-31, 52-56.

¹³³ "When Guido Calabresi, dean of the Yale Law School, reflects . . . he speaks in partial self-indictment: her work on sexual harassment was so original that law faculties did not understand its significance, he says." Ibid., 54-55.

¹³⁴ "Haverford College Commencement," New York Times, 20 May 1991, p.A13. See also, The Guide to American Law Supplement 1990 (New York: West Publishing Co.): 243-244, referencing the Supreme Court adoption of MacKinnon's theory of sexual harassment as sex discrimination in Meritor Savings Bank FSB v. Vinson, 106 S. Ct. 2399 (1986).

MacKinnon stated that "When we started, there was absolutely no judicial precedent for allowing a sex discrimination suit for sexual harassment."¹³⁵ The initial motivation for the development of a legal remedy to assist such a claim was hearing about the case of Carminita Wood, who had been denied unemployment benefits after leaving a work environment where she alleged sexually harassing behavior from a supervisor.¹³⁶ MacKinnon's intent in providing a legal remedy was "to bring to the law something of the reality of women's lives."¹³⁷ That the law should take into account the perception and experience of the sexually harassed woman was "the promise of 'equal protection of the laws' for women."¹³⁸ MacKinnon reasoned that prior to such a change in law, the message of the law to women was either that women were not valuable enough to be considered harmed by sexual harassment, or that they were unreasonable to consider sexual harassment harmful.¹³⁹

At the beginning of MacKinnon's theory development, discrimination was defined as existing only when two equivalent groups were treated differently. Therefore,

¹³⁵ Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987): 116.

¹³⁶ Strebeigh, "Defining Law," 31.

¹³⁷ MacKinnon, Sexual Harassment, xii.

¹³⁸ MacKinnon, Feminism Unmodified, 105.

¹³⁹ Ibid., 108, 110.

being different from men allowed women to be treated differently. MacKinnon termed this a "dominance" approach that recognized only the male viewpoint in legal decisions, and she argued against it.¹⁴⁰

Instead, MacKinnon suggested a different theoretical legal recognition of two approaches to discrimination. The first she called the "differences" approach. This approach "envision[s] the sexes as socially as well as biologically different from one another," but does not allow different treatment of the two sexes that are based on "distinctions or classifications that are preconceived and/or inaccurate." She felt the differences approach was sensitive to disparity and similarity, and "can be a useful corrective to sexism."¹⁴¹

The second theoretical approach developed by MacKinnon was called the "inequality" approach. It argued that "the sexes . . . [were] not simply socially differentiated, but socially unequal." She proposed in this approach that "all practices which subordinate women to men are prohibited." She felt that the inequality approach could remedy the "structural problem of enforced inferiority" that denied the harm of sexual harassment to women.¹⁴²

¹⁴⁰ "The view that discrimination consists of arbitrary differentiation dominates the legal doctrine and scholarly thinking on the subject." MacKinnon, Sexual Harassment, 5.

¹⁴¹ *Ibid.*, 4.

¹⁴² *Ibid.*, 4-5.

At the heart of MacKinnon's legal theory was the concept that sexual harassment was a "systematic abuse of power" that was allowed by the law at the time.¹⁴³ The denial that sexual harassment was harmful or caused injury was explained away by defenses that called the behavior "personal, biological, not a policy and thus (implicitly) not employment discrimination."¹⁴⁴ That the defenses were accepted by the courts indicated that persons who called themselves victims had no power to define the harm and no recourse for their perception that harm was done to them. As MacKinnon stated, "the voice of law is the voice in power."¹⁴⁵ Therefore, she reasoned, women were powerless.

MacKinnon defined two forms of sexual harassment. The first she termed "quid pro quo, in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity." The second form of sexual harassment she termed a "persistent condition of work."¹⁴⁶ Reflecting on the lack of availability of legal recourse at the time for either form of sexual harassment, she said "the sexual harassment of working women presents a closed system of predation in which powerlessness builds powerlessness."¹⁴⁷

¹⁴³ MacKinnon, Feminism Unmodified, 107.

¹⁴⁴ MacKinnon, Sexual Harassment, 7.

¹⁴⁵ MacKinnon, Feminism Unmodified, 105.

¹⁴⁶ MacKinnon, Sexual Harassment, 32.

¹⁴⁷ Ibid., 55.

She argued for a doctrine that conceived of sexual harassment as "unequal treatment based on sex," and, therefore, as sexual discrimination.¹⁴⁸

The issue of power, or lack of it, was crucial to understanding that sexual harassment was not an issue of sexuality. Persons with legally recognized defenses against sexual harassment, or legal power, were generally those of one sex. Those bringing charges that were denied, or not given power by the legal system, were usually of another sex. MacKinnon theorized that this legal disposition of sexual harassment cases reflected the social inequality of the sexes.¹⁴⁹

At the time of MacKinnon's development of this legal theory (the mid to late 1970s), the concept of civil rights unaffected by sex was relatively novel. MacKinnon's development of this legal theory can be credited with changing inequities in this area of the law. Her development of a scholarly legal understanding of sexual harassment as a violation of civil rights based on sex has contributed to case law enforcing Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.¹⁵⁰

¹⁴⁸ Ibid., 59.

¹⁴⁹ MacKinnon, Sexual Harassment, 1.

¹⁵⁰ In the Supreme Court Title VII case that established hostile environment sexual harassment as legally actionable in work settings, *Meritor Sav. Bank FSB v.*

In summary, a review of literature concerning sexual harassment provided a context for understanding the concept of environmental sexual harassment. A legal definition of environmental sexual harassment for the higher education setting was developed after the legal definition of quid pro quo sexual harassment was established. The influence of MacKinnon's theory that sexual harassment was sex discrimination resonated from Title VII work setting cases to Title IX higher education cases.

Vinson, 477 U.S. 57 (1986), MacKinnon was co-counsel for the plaintiff and wrote the brief presented for the plaintiff. Fechner, "Law Reform," 476. In the hostile environment sexual harassment Title IX case that established hostile environment as legally actionable in education settings, *Moire v. Temple Univ. Sch. of Medicine*, 800 F.2d 1136 (1986), MacKinnon's definition of sexual harassment and of the two forms of sexual harassment were cited in the judicial opinion. *Moire*, 613 F. Supp. at 1366.

CHAPTER III METHODOLOGY

The traditional methodology of legal research provided the organizing framework for this study.

Legal research is subject to the same general requirements as other forms of research. The task is to summarize pertinent statistics, to trace further legal developments through related court decisions, and finally to analyze the decisions in the light of the problem under investigation.¹

The methodology of educational legal research, however, differs from and should not be associated with current definitions of qualitative research.²

In studying a legal issue, the researcher, where appropriate, first analyzes controlling statutes and, where applicable, federal and state constitutions. Following that procedure, a list of court cases is compiled through the use of legal finding tools, including computer data banks. Each of these court decisions is read and analyzed, a process that allows the researcher to proceed systematically in the

¹ George Mouly, Educational Research: The Art and Science of Investigation (Boston: Allyn & Baker, 1977): 173.

² James H. McMillan and Sally Schumacher, Research in Education: A Conceptual Introduction 2d ed. (Glenview, Ill.: Scott, Foresman & Co., 1989): 383.

case-by-case analysis. The final step of the first phase of legal research is often a synthesis of selected cases.³

The second phase in studying a legal issue occurs

After one has analyzed the relevant statutes and court decisions, the researcher examines secondary sources. After synthesizing both primary and secondary sources, the analyst should be able to state a definitive position on the given legal issue.⁴

Therefore, for this particular study concerning both federal statutes and case law, the primary methodology comprised three steps. The first was a search for federal legislation concerning faculty sexual harassment of higher education students through the 1990-1991 Supreme Court session. Second, an analysis of legal principles and reasoning used in decisions concerning faculty sexual harassment of higher education students from the establishment of the Education Amendments of 1972 through the 1990-1991 Supreme Court session was conducted. The third constituted a review of critical legal commentary concerning faculty sexual harassment of higher education students through the 1990-1991 Supreme Court session.

MacKinnon indicated that judicial interpretations of constitutions and statutes that become precedent do not necessarily provide a clear path for understanding the

³ Ibid., 460.

⁴ Ibid.

evolution of law.⁵ Therefore, in addition to traditional legal research methods, this researcher further analyzed the federal cases concerning higher education student charges of sexual harassment against faculty from the establishment of the Education Amendments of 1972⁶ through the 1990-91 Supreme Court session. The framework for analysis was derived from MacKinnon's theoretical legal development of sexual harassment as sex discrimination in work settings.⁷

MacKinnon theorized that sexual harassment in work settings is sexual discrimination prohibited under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.⁸ She also indicated that sexual harassment in education settings is sexual discrimination prohibited under Title IX of the Education Amendments of 1972.⁹ Therefore, the first question asked concerned whether the plaintiff requested and or the court recognized the civil right to no discrimination on the basis of sex.

⁵ "When we started, there was absolutely no judicial precedent for allowing a sex discrimination suit for sexual harassment." Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987), 116.

⁶ 20 U.S.C. § 1681(a).

⁷ Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979).

⁸ MacKinnon, Sexual Harassment, 6.

⁹ *Ibid.*, 233-238.

MacKinnon categorized the defenses used against charges of sexual harassment into four "ideological constructs."¹⁰ She indicated that the "near universal" responses of defendants and judges concerning sexual harassment charges was to consider the charges as (a) a personal issue between the plaintiff and the defendant, (b) the response to a natural/biological inclination of the defendant, (c) not a result of company policy and therefore not action subject to Title VII enforcement, and (d) presenting unsurmountable administrative concerns because of the danger of unfounded accusations or increased demand on the judicial system.¹¹ The second question, then, concerned whether the defenses fit any of the "ideological construct" categories rather than central legal issues or sex discrimination doctrine.

MacKinnon also theorized that the approach of judicial reasoning should answer four questions:

1. Was there a differentiation?
2. Did it deprive the complainant(s)?
3. Was it based on sex?
4. Was it justified?¹²

The last question, then, asked if the judicial reasoning used in the ruling was based on these legal issues that MacKinnon synthesized from the sex discrimination doctrine

¹⁰ Ibid., 83.

¹¹ Ibid., 83-99.

¹² Ibid., 223.

of the Equal Protection Clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, of Title IX of the Education Amendments of 1972.

Data Sources

Primary and secondary sources were used in this study. The primary data sources were federal court decisions and legislation concerning environmental sexual harassment of higher education students by faculty.

A search for appropriate federal decisions was conducted through a number of research procedures, including the descriptive word method, the topic method, and the table of cases method.¹³ Relevant cases were most often located in the United States Reports, if they had reached the United States Supreme Court level, and all volumes containing federal cases in the National Reporter System. Shepard's Citations was used to determine the current validity and case history of relevant cases. Federal legislation was found in the United States Code (U.S.C.), the United States Code Annotated (U.S.C.A.), and the United States Code Service (U.S.C.S.).

Finding tools included commentary cited in the Index to Legal Periodicals, the legal encyclopedias of American Jurisprudence and Corpus Juris Secundum, and all appropriate digests. In addition to traditional legal research tools,

¹³ McMillan and Schumacher, Research in Education, 458-459.

other resources were also identified through the computerized data basis finding tools of ERIC, WESTLAW, and Dissertation Abstracts. Secondary sources of critical legal commentary were provided through these resources.

Data Organization

All data are presented chronologically to illustrate the evolution of legislation, legal principles and reasoning, and critical legal commentary concerning environmental sexual harassment of higher education students by faculty.

Data Analysis

Federal legislation was reviewed to identify the existing legal provisions contributing to the evolution of law relevant to environmental sexual harassment of higher education students by faculty. Each federal court decision was individually analyzed to identify legal principles and precedents established concerning environmental sexual harassment of higher education students by faculty. Critical legal commentary was reviewed for clarification of legal principles and reasoning and corroboration of court findings concerning higher education environmental sexual harassment cases. Additional relevant material indicated by data sources was also reviewed. A final analysis proceeded with a repeated reading of salient federal cases in order to answer the questions posed by the application of MacKinnon's legal theory.

Synthesis

A legal analysis of the relevant cases was completed. Then a summary analysis was used to integrate the results of the legal research. This analysis provided an explanation of how the law concerning environmental sexual harassment of higher education students has evolved.

An analysis of the same federal cases was then completed using elements of MacKinnon's legal theory. This analysis indicated the appropriateness of MacKinnon's theory of sexual harassment as sex discrimination for understanding the evolution of the environmental sexual harassment concept in the higher education setting.

The syntheses of the findings of these analyses substantially corroborated each other, providing a more robust understanding of how and why the legal concept evolved, providing additional data that a single analysis provided by either would not have contributed. The conclusions of the synthesis supported the appropriateness of MacKinnon's legal theory, developed for other settings, for understanding the evolution of environmental sexual harassment case law in the higher education setting. This outcome suggested future alternatives in the continuing evolution of this particular aspect of case law and provided an increased theoretical understanding of the concept of environmental sexual harassment.

Standards of Adequacy for Legal Research

The criteria for judging legal research differ from those used in other types of research. A specific concern of legal research is the criticism of sources.¹⁴ This researcher addressed the external criticism of authenticity of source through the use of established legal citation standards that provide documentation of sources.¹⁵

Internal criticism of sources to determine credibility of stated facts concerns the accuracy and trustworthiness of stated facts. This researcher addressed trustworthiness through the evaluation of statements made by parties in court cases in terms of chronological and geographical proximity to events, competence, bias, and the conditions under which the statements were made. Accuracy of facts was addressed by considering common knowledge, motivation of concerned parties, and agreement with other known facts.¹⁶

Other criteria for judging the adequacy of legal research include a clearly stated legal issue or topic with a defined scope or limitations, logical organization of commentary, appropriate selection of sources for legal topic under consideration, unbiased treatment of topic, and

¹⁴ McMillan and Schumacher, Research in Education, 446-450.

¹⁵ Harvard Law Review Association, A Uniform System of Citation, 15th ed. (Cambridge, Mass.: Gannett House, 1991).

¹⁶ McMillan and Schumacher, *Ibid.*, 448.

logical relation of conclusions to analysis.¹⁷ These issues were addressed in Chapter I and elsewhere in this chapter.

Another issue in evaluating legal research concerned the stated objective of legal research, "understanding the law at the point in time."¹⁸ This issue was addressed by providing a distinct time frame for this study. Therefore, ✓ a limitation was established for considering relevant case law and legislation from the establishment of the Education Amendments of 1972 through the conclusion of the 1990-1991 Supreme Court session.

A final step in validating the legal research was in presenting the research to selected legal readers. The ✓ external readers provided corroboration and clarification of interpretations of legal principles presented in this study. An initial reading and criticism of Chapter I was provided by Alison Wetherfield, staff attorney for the National Organization of Women (NOW) Legal Defense and Education Fund. Ms. Wetherfield is also an adjunct professor in the Department of Politics at New York University. She most recently was successful in the case of Robinson v. Jacksonville Shipyards, Inc., et al., an environmental sexual harassment case cited in Chapter I.

¹⁷ Ibid., 465.

¹⁸ Ibid., 460.

Dr. H. C. Hudgins, Chairman of the Educational Leadership Department of East Carolina University provided comments on Chapter II. Dr. Margaret Smith, Director of the University of Southern Mississippi's Education Law Institute provided comments on Chapters IV and V. Charles V. Curcio, retired Deputy General Counsel for General Services Administration, Washington, D.C., provided comments on Chapter VI.

CHAPTER IV ANALYSIS OF THE CASES

The purpose of this study was to identify and analyze the evolution of the legal concept of environmental sexual harassment of higher education students by faculty. A search to identify case law regarding environmental sexual harassment of students by faculty in the higher education settings produced four relevant federal cases that resulted in fourteen reported court opinions. Each case involved allegations based on Title IX, in which the student claimed to experience sexual discrimination from sexual harassment in the educational environment.

The complexity of the cases provided atypical case histories in some instances. For example, a motion for a Supervisory Writ of Mandamus to the appellate court and Supreme Court, prior to the district court ruling in *Bougher v. University of Pittsburgh*,¹ resulted in a Supreme Court denial of certiorari before the district and appellate court cases were heard.² The occurrence of interlocutory

¹ 713 F. Supp. 139 (W.D. Pa. 1989).

² "Meanwhile, plaintiff filed with the Court of Appeals for the Third Circuit a Petition for a Supervisory Writ of Mandamus once more attempting to block defendant's [request for plaintiff's] psychiatric examination. . . . The Third Circuit denied plaintiff's invitation to micro-manage the micro-management of discovery that Judge Teitelbaum had been

Table 1

Table of Federal Cases Alleging Environmental Sexual
Harassment of Higher Education Students by Faculty

Case Histories

Alexander v. Yale University, 459 F. Supp. 1 (D. Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980).

Bougher v. University of Pittsburgh, cert. denied, 108 S. Ct. 460 (1987); 713 F. Supp. 139 (W.D. Pa. 1989), aff'd, 882 F.2d 74 (3d Cir. 1989).

Lipsett v. University of Puerto Rico, 576 F. Supp. 1217 (D.P.R. 1983) (motion to dismiss denied); 637 F. Supp. 789 (D.P.R. 1986) (summary judgment for defendants); and (this case only) sub nom. Lipsett v. Rive-Mora, 669 F. Supp. 1188 (D.P.R. 1987) (summary judgment for defendant); rev'd 864 F.2d 881 (1st Cir. 1988); 740 F. Supp. 921 (D.P.R. 1990) (expert witness certification denied); 745 F. Supp. 793 (D.P.R. 1990) (University granted sovereign immunity); 759 F. Supp. 40 (D.P.R. 1991) (motion denied for judgment n.o.v.).

Moire v. Temple University School of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986).

Table 2

A Chronology of Federal Cases Alleging Environmental Sexual Harassment of Higher Education Students by Faculty

Year	Cases
1977	Alexander v. Yale University, 459 F. Supp. 1 (D. Conn. 1977)
1980	Alexander v. Yale University, 631 F.2d 178 (2d Cir. 1980)
1983	Lipsett v. University of Puerto Rico, 576 F. Supp. 1217 (D.P.R. 1983)
1985	Moire v. Temple University School of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985)
1986	Moire v. Temple University School of Medicine, <u>aff'd</u> , 800 F. 2d 1136 (3d Cir. 1986) Lipsett v. University of Puerto Rico, 637 F. Supp. 789 (D.P.R. 1986)
1987	Bougher v. University of Pittsburgh, <u>cert. denied</u> , 108 S. Ct. 460 (1987) Lipsett v. Rive-Mora 669 F. Supp. 1118 (D.P.R. 1987)
1988	Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988)
1989	Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989) Bougher v. University of Pittsburgh, 882 F.2d 74 (3d Cir. 1989)
1990	Lipsett v. University of Puerto Rico, 740 F. Supp. 921 (D.P.R. 1990) Lipsett v. University of Puerto Rico, 745 F. Supp. 793 (D.P.R. 1990)
1991	Lipsett v. University of Puerto Rico, 759 F. Supp. 40 (D.P.R. 1991)

process and denies equal opportunity in education."⁶ The plaintiffs claimed a right to relief individually and as a class under Title IX of the Education Amendments of 1972 from the University's purported sex discrimination.⁷ The principle relief sought was for a declaratory judgment that Yale's practices and policies regarding sexual harassment violated Title IX and injunctive relief that would require Yale to "institute and continue a mechanism for receiving, investigating and adjudicating complaints of sexual harassment."⁸

Other relief sought included compensatory relief for one plaintiff who asserted that she had spent "time, effort, and money" attempting to present the claims of student sexual harassment to "responsible officials."⁹ Another plaintiff sought injunctive relief concerning a poor grade allegedly received from rejecting the sexual demands of a professor, specifically requesting an investigation and a transcript notation that the grade was under review.¹⁰ A claim by another student of discrimination that forced her

⁶ Alexander v. Yale Univ., 459 F. Supp. 1, 2 (D. Conn. 1977).

⁷ Id.

⁸ Id. at 3.

⁹ Id.

¹⁰ Id. at 4,6.

into leaving an athletic team did not state a specific request for relief.¹¹

Two issues were a foci for this case. The first concerned whether a federal court should recognize or create a new right of action for an individual or class for whom an administrative remedy already exists under Title IX. The second concerned arriving at a determination of whether the plaintiffs had been deprived of cognizable Title IX rights.

The court found that the alleged harm claimed from an environment that "hampered" the teaching efforts of a male professor, "great emotional distress" claimed by a student from her knowledge of another student's being sexually pressured, and the rebuffed efforts of a student attempting to remedy other students' claims of sexual harassment did not present a factual basis for a violation of Title IX.¹² The court stated that "no judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong, and the claims just mentioned are untenable on their face."¹³

Concerning the two students who claimed a personal experience of discrimination through sexual harassment, the court differentiated the actionability of such claims on the base of the student's attempt to inform Yale of the alleged

¹¹ Id. at 3,4.

¹² Id. at 3.

¹³ Id.

discrimination.¹⁴ The court said that when a complaint of such an incident is made, university inaction then does assume significance. When refusing to investigate, the institution may sensibly be held responsible for condoning or ratifying the employee's invidiously discriminatory conduct.¹⁵ Therefore, the student who did not attempt to inform the university did not state a cognizable claim; the student who did attempt to do so was recognized as stating a cognizable Title IX claim.¹⁶

The issue of determining the appropriateness of creating a judicial remedy when an administrative remedy exists was resolved by reference to lack of Title IX legislative history expressly permitting or precluding a private right of action.¹⁷ Citing Title VI of the Civil Rights Act of 1964¹⁸ as the prototype for legislative intent concerning the reasoning of Title IX, the court noted that Title VI violations are actionable.¹⁹ The court also stated that "it seems unsound to dismiss this complaint in its entirety at the outset on the sheer assumption that administrative enforcement may prove adequate while refusing

¹⁴ Id. at 4.

¹⁵ Id. at 4.

¹⁶ Id.

¹⁷ Id. at 5.

¹⁸ 42 U.S.C. § 2000(d).

¹⁹ Id.

to allow a threshold showing purporting to demonstrate the contrary."²⁰ However, the court then reasoned that the statute of Title IX "is clearly addressed to specific practices of exclusion, inequitable resource allocation and similar concrete abuses."²¹ Therefore, "imponderables" and vicariously experienced wrong did not constitute cognizable Title IX claims.

Since Title IX did not require administrative exhaustion or preclude a private right of action, and one student had stated a claim concerning a cognizable Title IX right, the court denied the defendant's motion to dismiss concerning the student who presented a quid pro quo sexual harassment claim.²² The remainder of students, who presented environmental sexual harassment claims, were dismissed from the case as not stating a valid cause of action under Title IX.²³

At trial the remaining plaintiff was found to have received the disputed class grade solely on academic achievement.²⁴ Subsequently, in an amended complaint, the plaintiff and the previously dismissed plaintiffs, excluding

²⁰ Id. at 6.

²¹ Id.

²² Id. at 7.

²³ Id.

²⁴ Alexander v. Yale Univ., 631 F.2d 178, 183 (2d Cir. 1980).

the professor, appealed and again sought the relief of a declaratory judgment stating that "Yale's policies and practices regarding sexual harassment violate Title IX" and the injunctive relief of the creation of a procedure for "adjudicating complaints of sexual harassment . . . under the supervision" of the court.²⁵

The appellate court reasoned that the previously dismissed plaintiffs did not state a justiciable case because they did not suffer a "distinct and palpable injury," the court could not redress what was claimed as an injury, and the mootness doctrine precluded addressing the claims.²⁶ The district court reasoning concerning actionable Title IX violations concerning sexual harassment was also considered valid by the appellate court.²⁷ Therefore, the appellate court affirmed the district court dismissal of all plaintiffs but the one claiming to have

²⁵ Id. at 181.

²⁶ "Their graduations appear to prevent the courts both from addressing the predominant injury relied upon--deprivation of an educational environment free from condoned harassment--and from awarding the relief requested--an order directing Yale to institute effective procedures for receiving and adjudicating complaints of sexual harassment. None of these plaintiffs at present suffers from the alleged injury. Nor would the grant of the relief aid these plaintiffs in the slightest. Thus their claims appear moot." Id. at 183, 184.

²⁷ "It is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education." Id. at 182.

experienced a personal, tangible discriminatory action.²⁸ Concerning this plaintiff, the appellate court held that since at trial she "failed to prove her case, she failed to prove any perceptible harm and therefore lacks standing to attack Yale's failure to establish a complaint procedure."²⁹

A post-trial motion was made by the same plaintiff to introduce testimony supportive of her claim of sexual harassment by a professor. The appellate court referenced the district court's subsequent refusal to reopen the record and agreed that "the weight of [the additional testimony] . . . could have at best been slight."³⁰

The significance of Alexander concerned the court interpretation of quid pro quo sexual harassment, the alleged and subsequently disproved sexual request in exchange for a grade of "A,"³¹ as a violation of Title IX. The district and appellate courts were in agreement that the alleged sexual harassment claimed to result from a sexually discriminatory environment did not provide a cause of action under Title IX.³² In this case the legal concept of

²⁸ Id. at 183-84.

²⁹ Id. at 185.

³⁰ Id. at 185-86.

³¹ Supra note 28.

³² "No judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong." Alexander, 459 F. Supp. at 3. "In a

environmental sexual harassment of students by faculty was not developed or recognized as actionable under Title IX, even though the students bringing action claimed it to be so.

Moire v. Temple University School of Medicine

The plaintiff in this case³³ brought a civil rights action under Title IX and 42 U.S.C. §§ 1983 and 1985, claiming that she experienced sexual discrimination through sexual harassment that resulted in her failure of a psychiatric clerkship.³⁴ She also alleged that Temple administrators "violated her Fourteenth Amendment right to due process by failing to investigate or remedy her timely complaints appropriately."³⁵ She sought declaratory and compensatory relief based on the alleged sexual harassment

Title IX suit, it is the deprivation of 'educational' benefits which, once proven, allows the court to afford relief." Alexander, 631 F.2d at 184.

³³ Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985), aff'd, 800 F.2d 1136 (3rd Cir. 1986).

³⁴ "Plaintiff alleged that Dr. Crabtree's conduct toward her created a sexually harassing, discriminatory atmosphere at Horsham [the place of her psychiatric clerkship] and that Horsham and Temple officials conspired to maintain such an environment in violation of her rights under the Fourteenth Amendment, 42 U.S.C. §§ 1983 and 1985, and Title IX (20 U.S.C. § 1681). Moire, 613 F. Supp. at 1366. "Challenging her psychiatric clerkship grade only, plaintiff alleged that the defendants illegally conspired against her and failed her because of her sex." Id. at 1362.

³⁵ Id.

that she claimed subsequently led to repeating the third year of medical school at her own expense.³⁶

One issue of this case concerned whether a violation of the Fourteenth Amendment right of due process occurred from sexual harassment that resulted in a biased evaluation or hearing procedure.³⁷ Another issue was the determination whether or not sex discrimination, actionable under Title IX, included the alleged sexual harassment that did not deny admission to or the benefits of education.³⁸

Prior to trial before this case, the plaintiff and defendant stipulated to certain facts. These stipulations showed agreement concerning the plaintiff's voluntary placement in the clerkship program, subsequent assignments within the program, documentation that private discussions occurred between the plaintiff and the program supervisor, and order of appeals within the program.³⁹ A disagreement

³⁶ "Plaintiff's alleged deprivation is an unlawful loss of whatever Fourteenth Amendment liberty or property interest she might have in her timely promotion." Id. at 1366.

³⁷ The court stated that one issue concerned "whether Horsham's failure to give plaintiff a passing grade was arbitrary and capricious and in retaliation for her complaint to Temple officials and whether Temple's acceptance of Horsham's grade was arbitrary and capricious." Id. at 1365.

³⁸ "The issue is whether plaintiff because of her sex was in a harassing or abusive environment at Horsham [the place of the psychiatric clerkship] with Temple's tacit or explicit consent." Id. at 1367.

³⁹ Id. at 1362-65.

existed on the content and intent of the conversations in the private discussions, as well as the motivating factors for the grade assigned to the plaintiff for her clerkship.⁴⁰

The Moire court followed the reasoning of Alexander v. Yale⁴¹ that indicated that quid pro quo sexual harassment was a violation of Title IX. Since the plaintiff "never accused Dr. Crabtree of attempting physical contact, soliciting sexual intimacies or threatening her with failure in order to obtain sexual favors," the court reasoned that quid pro quo sexual harassment had not occurred.⁴²

However, the Moire court also recognized the existence of another form of sexual harassment, relying on the Equal Employment Opportunity Commissions (EEOC) 1980 Guidelines on Sexual Harassment definition of abusive environment sexual harassment.⁴³ After examining the "appearance and demeanor of all the witnesses, their bias or interest in the outcome, the inherent consistency of their testimony [and] . . . their contemporaneous actions and writings," the court found that the "inability of Horsham staff members to make

⁴⁰ Id. at 1367-69.

⁴¹ Alexander, 459 F. Supp. at 4 (D. Conn. 1977), aff'd 631 F.2d 178.

⁴² Moire, 631 F. Supp. at 1367.

⁴³ "Harassment from abusive environment occurs where multiple incidents of offensive conduct lead to an environment violative of a victim's civil rights." Id. at 1366-67.

her [plaintiff] understand that her problems stemmed from her inappropriate, assertive behavior . . . did not constitute [abusive environment] sexual harassment."⁴⁴ Therefore, since neither quid pro quo nor abusive environment sexual harassment occurred, the court held that the plaintiff's claims of violation of Title IX failed.⁴⁵

Concerning the plaintiff's substantive due process rights, the court focused on considering "whether a decision to fail a student was rational and had a reasonable basis in fact in order to determine if impermissible factors were operative."⁴⁶ The court found that the plaintiff's grade was based on clinical performance,⁴⁷ and was not in violation of any right of plaintiff to substantive due process.⁴⁸

The plaintiff's claims concerning procedural due process were not based on a lack of sufficient procedure to appeal academic decisions. Instead, the plaintiff claimed that the procedure was biased in its application and that

⁴⁴ Id. at 1369-70.

⁴⁵ "In the absence of sexual harassment at Horsham, Temple could not have either conspired or acted independently to condone or encourage such an [abusive] environment." Id. at 1370.

⁴⁶ Id. at 1371.

⁴⁷ Id. at 1372.

⁴⁸ Id. at 1372-73.

Temple did not adhere to its own Promotional Guidelines.⁴⁹ The court reasoned, however, that "there is no reason to believe Temple officials were predisposed against plaintiff or improperly motivated by institutional considerations regarding Horsham."⁵⁰ The deviations alleged from the Promotional Guidelines were considered "sufficiently minor" enough to "not affect the fundamental fairness of Temple's proceedings."⁵¹ Therefore, the court found that the plaintiff had received the procedural due process available to her under the Fourteenth Amendment.⁵²

The final judgment of the court was entered in favor of the defendants. The court found:

no credible evidence that Dr. Crabtree made improper sexual advances to plaintiff, nor that he and other Horsham and Temple faculties conspired to discriminate illegally against her on the basis of sex. The court also finds that Temple's decision to require plaintiff to complete her third year was made after a careful and deliberate process that informed her of the proceedings and afforded repeated and meaningful opportunities for her to challenge the decision.⁵³

On appeal the appellate court affirmed the decision of the district court without an opinion.⁵⁴

⁴⁹ Id. at 1375-76.

⁵⁰ Id.

⁵¹ Id. at 1376.

⁵² Id. at 1376-77.

⁵³ Id. at 1362.

⁵⁴ *Moire v. Temple Univ. Sch. of Medicine*, 800 F.2d 1136 (1986).

The significance of Moire is derived from its expansion of the definition of sexual harassment actionable under Title IX to include abusive environment sexual harassment.⁵⁵ The court accepted principles developed for work setting sexual harassment cases, reasoning that "though the sexual harassment 'doctrine' has generally developed in the context of Title VII, these guidelines seem equally applicable to Title IX."⁵⁶

Bougher v. University of Pittsburgh

The complexity of this case was described by the district court judge as a "quagmire [that] began as a pro se complaint filed May 27, 1986"⁵⁷ and that continued through a "protracted skirmish over defendants' attempt to schedule an independent medical examination of plaintiff, to obtain plaintiff's medical history, and to depose plaintiff's psychologist."⁵⁸ During the discovery "skirmish" the plaintiff petitioned the Third Circuit Court of Appeals to block the district court order for a "mental examination".⁵⁹ Upon denial, while still in the district court discovery period, the plaintiff petitioned for a writ

⁵⁵ Moire, 613 F. Supp. at 1366.

⁵⁶ Id. at 1367 n.2.

⁵⁷ Bougher, 713 F. Supp. at 140.

⁵⁸ Id. at 141.

⁵⁹ The court characterized the plaintiff as "unhappy with the order for psychiatric examination." Id. at 141.

of certiorari in the Supreme Court, which was also subsequently denied.⁶⁰

The plaintiff brought action claiming a violation of Title IX by the university, its chancellor, its affirmative action officer and a professor of rhetoric.⁶¹ She claimed that since 1976 the professor had sexually harassed and intimidated her, and that the university, the chancellor, and the affirmative action officer had discriminated against her by failing to have an adequate grievance procedure to resolve charges of sexual harassment.⁶² She further claimed a violation of 42 U.S.C. §§ 1983 and 1985 through the alleged failure to investigate her complaint and retaliation for making the complaint.⁶³

Injunctive and declaratory relief were sought for the quid pro quo and hostile environment sexual harassment claims.⁶⁴ The plaintiff also sought compensatory damages for the "loss of educational opportunities, and consequently

⁶⁰ This decision to deny the plaintiff's request [Bougher, 108 S. Ct. 460 (1987)] overruled the plaintiff's "unhappiness." Id. at 141-142.

⁶¹ Id. at 142.

⁶² Id.

⁶³ Id.

⁶⁴ Id. at 143.

of opportunities for employment and income."⁶⁵ The defendants moved for a summary judgment.⁶⁶

The first issue focused on by the court concerned what the "plaintiff [must] show in order to prove a prima facie case" of Title IX violation.⁶⁷ A second issue involved the determination of whether an environmental sexual harassment claim as defined by Title VII of the Civil Rights Act of 1964 could reach an actionable claim of sexual harassment as defined by Title IX.⁶⁸ The last issue of this case concerned whether Section 1983 could also be used to seek relief for a statutory violation (Title IX) in addition to original congressional intent of providing a basis for seeking relief for violations of constitutional rights.⁶⁹

⁶⁵ Id. at 141-42.

⁶⁶ Id. at 141. "Defendants' Answer generally denies the general allegations of the plaintiff." Id. at 142.

⁶⁷ "To prove a prima facie case, plaintiff must show (1) that she was excluded from participation in or denied the benefits of or subjected to discrimination in an educational program; (2) that the program receives federal assistance; and (3) that the exclusion was on the basis of sex, i.e., gender. Plaintiff does not state, nor do the facts allege, a Title IX claim against Pitt. Even accepting plaintiff's uncorroborated allegations as true . . . she does not allege the denial of any benefit by Pitt to her on the basis of sex." Id. at 143-44.

⁶⁸ "Plaintiff, desirous of stating a claim, blandly blurs fundamental distinctions between Title VII of the Civil Rights Act of 1964 . . . and Title IX of the Education Amendments of 1972." Id. at 144.

⁶⁹ "Plaintiff cannot assert Section 1983 liability on the part of Pitt, and a fortiori of the individual defendants unless she can identify a protected constitutional or federal substantive due process right in her right to be

Quid pro quo sexual harassment by the recipient of federal funds, such as the University of Pittsburgh, was recognized by the court as a violation of Title IX.⁷⁰ The court reasoned that since the plaintiff did not "allege the denial of any benefit by Pitt to her on the basis of sex," nor allege that the professor discriminated against her, there therefore was no valid quid pro quo claim.⁷¹ The court also stated that the University of Pittsburgh had fulfilled its duty under Title IX by publishing a nondiscriminatory policy on the basis of sex and establishing an internal procedure for discrimination complaints concerning admission or denial of benefits.⁷²

The court characterized the plaintiff's request to use the hostile environment definition developed by the EEOC for work settings as "a leap into the unknown which, whatever its wisdom, is the duty of Congress or an administration

free of unwanted sexual advances by defendant Melia, which Pitt violated by not developing procedures to restrain." Id. at 145-46.

⁷⁰ "Title IX prevents gender discrimination in a federal program's distribution of benefits. It also clearly reaches what has been defined as quid pro quo sexual harassment by a recipient of Federal funds, since without administrative interpretation this clearly violates Title IX by conditioning benefits on the basis of impermissible criteria." Id. at 145.

⁷¹ Id. at 144.

⁷² "Plaintiff further lacks standing to challenge the adequacy of Pitt's gender nondiscrimination policy, since she does not assert any grievance to her that the University had a duty to hear." Id. at 145.

agency to take."⁷³ Title VI was cited as the statute after which Title IX was patterned; therefore, Title VII was not an appropriate statute from which to transfer agency principles to Title IX.⁷⁴ Thus, the court reasoned, "Title IX simply does not permit a 'hostile environment' claim as described for the work place by 29 C.F.R. § 1604.11(a)(3) [the codification of Title VII]."⁷⁵

Similar reasoning followed that led to the court's decision that the plaintiff also did not state a claim based on Section 1983. The court found inappropriate the request to transfer a Section 1983 remedy to an alleged statutory violation. The court reasoned, "Section 1983 is no more of an invitation to create expanded causes of action than it is to create federal causes of action based on federal tort law."⁷⁶

The court dismissed with prejudice what it had previously termed as "plaintiff's complaints of problems in her private relationship with defendant Melia, which is not action prohibited or regulated by Title IX."⁷⁷ This

⁷³ Id. at 145.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ "A statute, such as Title IX, which contains its own remedies and is implemented through its own procedural scheme, does not permit bypassing what Congress has written by going directly to Section 1983." Id. at 146.

⁷⁷ Id. at 145.

summary judgment for the defendants was appealed. The appellate court affirmed the decision to dismiss, "but not entirely on the same grounds relied on by the district court."⁷⁸

The appellate court found it "unnecessary to reach the question, important though it may be, whether evidence of a hostile environment is sufficient to sustain a claim of sexual discrimination in education in violation of Title IX."⁷⁹ The appellate court chose, instead, to hold "that the allegations within the applicable limitations period fail to state a cause of action."⁸⁰ Therefore, chance public encounters in a public restaurant where the plaintiff alleged the professor stared and glared at her were the only actions considered in reviewing the district court's decision.⁸¹

The district and appellate court in this case are consistent in the reasoning used to remove Title IX

⁷⁸ Bougher v. University of Pittsburgh, 882 F.2d at 75 (3rd Cir. 1989).

⁷⁹ Id. at 77.

⁸⁰ Id.

⁸¹ "Such actions, without more, do not rise to the level of a Title IX violation." Id. "Absent any allegations of unlawful conduct cognizable under Section 1983 within the two year period prior to the filing of her complaint, the court properly dismissed the Section 1983 claim against Melia." Id. at 78-79. "Because the Section 1985(3) claim is subject to the same two year statute of limitations as the Section 1983 claim, Bougher's Section 1985(3) claim is also time barred." Id. at 80.

liability from the chancellor, affirmative action officer, and professor; specifically, that none were the recipients of direct federal funding.⁸² Interestingly, neither court followed the 1987 Civil Rights Restoration Act,⁸³ which invalidated the requirement of Grove⁸⁴, which limited action to only direct recipients of federal funding.

Both courts in this case were also silent concerning the reasoning of a previous district court decision that transferred the Title VII hostile environment definition developed for work settings to the education setting, making hostile environment sexual harassment actionable under Title IX.⁸⁵ These opinions were consistent with a strict adherence to interpreting Title IX rights as concerning only admission to the education environment or admission to the

⁸² Citing the district court's reasoning, the appellate court stated: "Because it is undisputed that Melia, Chancellor Posvar, and Dr. Coffey did not receive federal funds, the court also granted summary judgment for these defendants in their individual capacities. On appeal, Bougher does not challenge the court's decisions as to these defendants." Id at 77. n.3. Nor did the appellate court challenge the district court's decision.

⁸³ 20 U.S.C. § 1687 (Supp. 1988).

⁸⁴ Grove City College v. Bell, 465 U.S. 555 (1984).

⁸⁵ 613 F. Supp. 1360, aff'd mem., 800 F.2d 1136 (3rd Cir. 1986). Reasoning from this case was cited, however, in the district court of Bougher as support for providing only injunctive and declaratory relief for Title IX claims. 713 F. Supp. 143 n.2, 143. Therefore, both the district and appellate courts of Bougher were aware of Moire. However, neither the district court nor appellate court of Bougher provided reasoning for their difference of opinion from the Moire court's decision to transfer of a Title VII standard to a Title IX case.

benefits of education. The district and appellate decisions of this case are significant in hewing to such a strict interpretation, precluding the conception that sexual discrimination may arise after admission to the environment or admission to the benefits of education, particularly since precedent existed to widen the interpretation of Title IX liability and rights concerning environmental sexual harassment.

Lipsett v. University of Puerto Rico

In this case a female surgery intern brought action claiming that the defendants' decision to fail to promote her to the fourth year residency level in the University of Puerto Rico (UPR) School of Medicine's Surgery Training Program was "unconstitutional and illegal discrimination on account of her sex and that the procedure used to arrive at this decision also violated her right to due process of law."⁸⁶ Due to a special arrangement between UPR and the

⁸⁶ "In essence, the complaint alleges that defendants have either permitted by inaction and/or participated directly in encouraging the biased attitudes prevailing at the Program against women who, like plaintiff, do not conform to the predominantly male faculty's conception of womanhood; an attitude which plaintiff alleges resulted in an unequal and discriminatory application or the standards of evaluation leading to the denial of her promotion. Plaintiff also alleges that federal defendant Ernesto River-Mora engaged in acts of sexual harassment against her and that the procedures used to evaluate her were conducted before a biased examining board without giving her adequate opportunity to examine the evidence against her and without following the procedure established by the UPR's student regulations." *Lipsett v. University of Puerto Rico*, 576 F. Supp. at 1217, 1219 (D.P.R. 1983).

Veterans Administration (VA), part of the UPR Surgery Training Program was completed at the VA Regional Hospital facilities and VA officials provided part of the evaluation for the Surgery Training Program.⁸⁷ Hence, the student/intern's complaint was brought against UPR administrative officials and professors for "violations of the Civil Rights Act, 42 U.S.C. § 1983, the Fourteenth Amendment, [and] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq."⁸⁸ and against several federal officials for violations of "her right to be free of discrimination as provided by the Fifth Amendment, the Civil Rights Act and Title IX."⁸⁹

The plaintiff sought damages and declaratory and injunctive relief. The Commonwealth of Puerto Rico defendants filed motions to dismiss and for summary judgment.⁹⁰ The court chose to provide a separate opinion and order for this petition.⁹¹ The federal defendants

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ These defendants challenged the complaint for "failing to state a cause of action against them and/or that they had no knowledge of the alleged discriminatory attitudes and incidents at the Program and that the decision to deny the program was based on valid reasons well as the result of fair proceedings." Id.

⁹¹ Id. For this opinion see *Lipsett v. University of Puerto Rico*, 637 F. Supp. 789 (D.P.R. 1986).

also filed a motion to dismiss, which was considered in the first ruling on this case.⁹²

The federal defense of sovereign immunity provided the focus for the issues in the first opinion of this case.⁹³ The first issue considered was the question of the potential for liability for damages and injunctive and equitable relief resulting from charges of unconstitutional behavior by individual federal employees and federal agencies.⁹⁴ The "legal basis of liability sought to be imposed on the federal defendants . . . based on novel interpretations of Title IX and the Civil Rights Act" provided a second issue for the first opinion.⁹⁵

The court cited the Supreme Court ruling on Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) as providing precedent that established that 'a citizen suffering a compensable injury to a constitutionally protected interest could . . . obtain an award against the responsible federal official.'⁹⁶ The allegations against defendant Dr. Rive-Mora were found to be "more than sufficient to state a Bivens action for damages against him

⁹² Id.

⁹³ Lipsett, 576 F. Supp at 1220.

⁹⁴ Id. at 1221-24.

⁹⁵ Id. at 1224.

⁹⁶ Id. at 1221.

in his individual capacity."⁹⁷ Therefore, the court reasoned that "this type of action [seeking damages]" was "unaffected by the defense of sovereign immunity since the claim for damages is considered as one against the individual and not one against the sovereign."⁹⁸

Concerning the injunctive relief requested of allowing the plaintiff to continue her surgery training at the VA Hospital, the court stated "an injunctive decree . . . may be plausible in view of the waiver of sovereign immunity contained in Section 702 of the Administrative Procedures Act. 5 U.S.C. 702."⁹⁹ The court "believe[d] that if the pleadings are taken at face value they . . . establish that plaintiff suffered a 'legal wrong'," for which injunctive relief would not provide an "intolerable burden."¹⁰⁰ Therefore, the court reasoned, "Section 702 would prevent

⁹⁷ Id. at 1222.

⁹⁸ Id.

⁹⁹ "Said waiver indicates [in part]:
An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in official capacity or under color of legal authority shall not be dismissed nor relief denied on the ground that it is against the United States or that the United States is an indispensable party." Id. at 1223.

¹⁰⁰ Id.

dismissal on grounds of sovereign immunity of the equitable relief requested."¹⁰¹

The determination, based on other sources of liability,¹⁰² that the complaint against the federal defendants could not be dismissed contributed to the court's decision to consider that liability for the federal defendants may exist under "novel interpretations" of Title IX and the Civil Rights Act.¹⁰³ The court reasoned that

It certainly cannot be denied that a strong argument by analogy can be made in support of plaintiff's position merely by examining how the other provisions in the Education Amendments Act regarding racial discrimination have been considered to be applicable to the federal government.¹⁰⁴

The "silence of the statute [Title IX] regarding its application to the federal government" and the possibility that further development of the facts might reveal additional reason for liability contributed to the court's decision to "reserve ruling . . . on these novel issues until further development of the case."¹⁰⁵ Therefore, liability under Title IX and the Civil Rights Act of 1964 was not precluded.

¹⁰¹ Id.

¹⁰² See the discussion of Bivens-type remedies and the Administrative Procedures Act, § 702. Id. at 1221-24.

¹⁰³ Id. at 1224.

¹⁰⁴ Id. at 1224.

¹⁰⁵ Id.

Accordingly, the court denied the motion to dismiss by the federal defendants and ordered the complaint against the United States dismissed.¹⁰⁶ The court had previously stated that a separate order and opinion would provide a ruling concerning the Commonwealth defendants.

The first opinion of Lipsett was significant in its allowance that "biased attitudes prevailing at the Program against women" and the alleged sexual harassment by Dr. Rive-Mora¹⁰⁷ might have contributed to sex discrimination against the plaintiff. While the court recognized the historic enforcement of Title IX as "withdrawal of federal funding to institutions that do not comply with Title IX,"¹⁰⁸ it left open to future judicial interpretation liability incurred from not complying with the possible expansion of the definition of actionable sex discrimination. The reasoning of this opinion did not preclude the possibility that sex discrimination could also occur from environmental sexual harassment.

The second Lipsett opinion concerned action for damages and injunctive and declaratory relief "brought pursuant to the Equal Protection and Due Process Clauses of the Constitution of the United States [and] the civil rights legislation" against UPR and various UPR officials and

¹⁰⁶ Id.

¹⁰⁷ Id. at 1219.

¹⁰⁸ Id. at 1224.

faculty.¹⁰⁹ The plaintiff claimed that she had experienced "adverse conduct and unequal treatment prompted by sexually discriminatory motives."¹¹⁰ She specifically cited a pervasive sexist attitude in the Surgery Residency Program, alleging that UPR officials and faculty were aware that she was sexually harassed by a group of senior residents.¹¹¹

The UPR officials and faculty responded with a motion for summary judgment.¹¹² In providing a decision for this request, the court explicated the plaintiff's claim into two parts: (a) the first based on "sex discriminatory practices within the UPR Surgery Residence Program" and (b) the second based on an "alleged lack of due process" in an evaluation which led to plaintiff's termination from the program.¹¹³

This two-part claim generated several issues that were considered by the court. The first issue concerned the factual basis required for claims of sexual harassment and sex discrimination.¹¹⁴ A second issue involved the

¹⁰⁹ Lipsett, 637 F. Supp. at 791.

¹¹⁰ Id.

¹¹¹ Id. at 793, 795.

¹¹² Id. at 792.

¹¹³ Id.

¹¹⁴ "The party opposing a motion for summary judgment must present a proffer of evidence sufficient to establish that there exist genuine issues of material controversies of fact which, if established at trial, would entitle that party to prevail on merits." Id. at 799.

establishment of liability from the alleged affirmative link between UPR knowledge of sexual harassment and inadequate response to such knowledge.¹¹⁵ A final focus of the court concerned the alleged loss of constitutional rights from a lack of due process in the evaluation process.¹¹⁶

The court first reviewed the plaintiff's claims concerning incidents and attitudes in the Surgery Program.¹¹⁷ Among the incidents were comments by the

¹¹⁵ "Liability in this type of case may be imposed on non-participating, supervisory-type defendants if plaintiff can establish an 'affirmative link' between those who participated personally in the wrongdoing and the defendants who were not personally involved." *Id.* at 800. To establish the 'link' plaintiff would need to show that these U.P.R. officials somehow supported, acquiesced, or encouraged the unruly residents' behavior by remaining impassive before complaints of such discriminatory and harassing conduct or by refusing to acknowledge and investigate a strikingly obvious pattern of sex discrimination and harassment. *See id.*, at 820-823.

¹¹⁶ "A critical factor in any due process analysis involves recognizing the interests that motivate the action taken and that determine whether the action taken--the procedures used--are sufficient to protect and balance these interests." *Id.* at 808.

¹¹⁷ "Translating this into specifics that the court can handle, plaintiff claims that on several undated occasions at the beginning of her internship, some male senior residents expressed to her and other female surgery residents their sexist attitudes by expressing their belief that surgery was no place for a woman. . . . [The male residents also constantly referred] to sex by describing their sexual adventures, making sexual jokes, giving nicknames to both male and female residents, some of which had sexual connotations, and placing pin-ups of nude women on the walls of the male residents rest facilities . . . where sometimes all residents had to meet or go to pick up their food. . . . In addition, plaintiff charges that other female residents, [including] herself, perceived how they were given harder tasks, held to tougher tests, and

Director of the Surgery Program, also overheard by another female resident, that indicated that he understood the hardships faced by women who were discriminated against in professions such as surgery, particularly in plaintiff's surgery program.¹¹⁸ The court dismissed this presentation of facts, deciding that the plaintiff "[fell] short of establishing the factual support for the importance and weight she attributed to these things."¹¹⁹ The court also stated that "many of the matters forming part of the alleged sexually oppressive scenario are based on plaintiff's own perceptions of objectively innocuous acts or comments."¹²⁰

Therefore, the court reasoned that the second issue, involving a determination of whether a link existed between discriminatory attitudes and behavior and supervisory liability, did not require consideration. The court concluded that "even assuming that all these allegations

reprimanded for the slightest errors by male residents to see if they could stand the pressure." Id. at 793-94.

¹¹⁸ Specifically, the Director understood that the hardships of "unequal physical facilities [for female residents] in one of the affiliated hospitals . . . the stricter standards of evaluation and sanctions applied to women residents and the gross disproportion of women to men that have completed the Program in the last twenty-two years, as signs that should have revealed to U.P.R. officials the presence of pervasive sex discrimination and harassment in their surgery program." Id. at 796.

¹¹⁹ Id.

¹²⁰ Id. at 802.

were true, they fail to establish a sufficiently obvious and pervasive pattern of discrimination and harassment that would make the U.P.R. officials liable for not taking notice of these circumstances."¹²¹

The last issue considered by the court focused on the plaintiff's claim of a violation of Fourteenth Amendment rights. Here the plaintiff contended that she was deprived of a property right of continuing and finishing the program, since she alleged that the third year status that she had attained in the program practically assured completion of the program. She also claimed that she was deprived of due process in the procedure used by the Surgery Program through inadequate notice of the evaluation charges against her and the process of her hearing.¹²²

Concerning this last issue, the court reasoned that the plaintiff's third year status was not one of "a typical third-year resident" since she had not gained it through usual reasons for a third-year promotion. She had been placed on probation and was notified that the third-year status was "qualified" to allow her time to seek another position after her effective dismissal from the program.¹²³ Hence, the court reasoned, the property interest usually assigned to the attainment of third-year

¹²¹ Id. at 801.

¹²² Id. at 803.

¹²³ Id. at 808.

status was not unqualified for the plaintiff and therefore presented no actionable claim for loss through a violation of Fourteenth Amendment rights.¹²⁴

Regarding the lack of due process claimed by the plaintiff, the court cited reasoning derived from landmark case law: "The Supreme Court has repeatedly stated that in the academic setting the requirements of constitutional due process may be satisfied by something less than a trial-like proceeding."¹²⁵ After reviewing the circumstances of the claim, the court decided that adequate notice and a proper investigation of the evaluation leading to the plaintiff's discharge had been provided.¹²⁶

The court also, however, cited the

quasi-employment context of the Program where the residents are placed, not only in a learning position as typical "students" for which the General Regulations were clearly intended, but also in a position in which they are already graduated doctors rendering compensable services.¹²⁷

The court then reasoned that the "quasi-employment" nature of the Program "made application of the general regulations cumbersome," thereby also allowing a "less than trial-like

¹²⁴ Id. at 808-09.

¹²⁵ Id. at 807.

¹²⁶ "We conclude that she was given adequate notice of the matters under investigation . . . [and that] the interviews conducted by committee members during the faculty and residents' meetings were not improper." Id. at 809-10.

¹²⁷ Id. at 811.

proceeding."¹²⁸ The court did not address the trial-like proceeding, by analogy, found to be required in employment settings.

This case is significant for the court's denial that the plaintiff's perception of facts disputed the perception of U.P.R. officials about the existence of discriminatory animus within the Surgery Program.¹²⁹ The facts presented by the plaintiff, which were corroborated by two other female Surgery Program participants, were alternately termed "objectively innocuous acts or comments"¹³⁰ or an "amalgamation of sometimes disconnected facts, rumors, perceptions and assumptions" whereby the "plaintiff [was] trying to find her way to the jury."¹³¹

Although the court cited the rulings of Alexander and Moire¹³² when discussing institutional liability for sexual harassment, it interpreted the harm alleged in this case as merely the result "of instances of friction and personality clashes arising from the competitive and

¹²⁸ "It is also necessary to recognize that the Program, and plaintiff's position therein, is far removed from the typical university student situation and presents several atypical factors that make it a sui generis type of educational setting, partly unsuitable for the strict application of the U.P.R. student regulations." Id.

¹²⁹ "As to these material facts, the record reveals there is no substantial controversy." Id. at 803.

¹³⁰ Id. at 802.

¹³¹ Id. at 798.

¹³² Id. at 801.

stressful atmosphere of a surgery program".¹³³ In granting a summary judgment for the defendants, however, the court did not choose to provide a factual standard for environmental sexual harassment to illustrate where the plaintiff failed in making her claim.

The third opinion of Lipsett concerned claims of sexual harassment and violation of due process and equal protection against Dr. Rive-Mora, individually and in his official position as Director of the Training Program of the San Juan Veteran's Administration.¹³⁴ The Center Director of the San Juan Veterans Administration and the Administrator of the United States Veterans Administration were also sued in their official capacities. As did the commonwealth defendants, the federal defendants moved for a summary judgment.¹³⁵

A major focus of this case concerned the plaintiff's introduction of the newly decided liability for environmental sexual harassment derived from the recent case of Meritor Savings Bank, F.S.B. v. Vinson.¹³⁶ The plaintiff requested that the liability for hostile environment sexual harassment in work settings established by this landmark case be transferred to the claims against

¹³³ Id. at 798.

¹³⁴ Lipsett v. Rive-Mora, 669 F. Supp. 1188.

¹³⁵ Id. at 1191,

¹³⁶ Meritor, 477 U.S. 57.

the federal defendants, initiating a determination of the appropriateness of such an application.

Another focus of this case concerned the nexus of involvement and liability of the VA Hospital, its Director, and VA Administrator concerning the charges of sexual harassment and unequal treatment.¹³⁷ A final area of concern was whether there existed a factual basis for trying the claims of sexual harassment and unequal treatment by Dr. Rive-Mora.¹³⁸ Woven throughout these two foci were what the court termed the plaintiff's "civil rights common enforcement scheme theory," referencing the above-mentioned request for application of Title VII liability to Title IX claims.¹³⁹

The issue of liability for the VA officials and the VA hospital focused on three areas. The first concerned the definition of an educational institution provided by Title IX.¹⁴⁰ Secondly, the appropriateness of the application of the concept of respondeat superior was considered.¹⁴¹

¹³⁷ Lipsett v. Rive-Mora, 669 F. Supp. at 1192-96.

¹³⁸ Id. at 1196-1203.

¹³⁹ Id. at 1193.

¹⁴⁰ "The Title IX definition of an 'educational institution' includes schools, colleges or departments of larger institutions, only if such subdivisions are 'administratively separate units,' 20 U.S.C., sec. 1681(c)." Id. at 1193.

¹⁴¹ Id. at 1194.

And, lastly, a determination was made concerning the actionability of a Section 1983 claim.¹⁴²

The reasoning of the court concerning charges against the VA officials and the VA Hospital first clarified that the VA Hospital was "not an independent surgery residence program" and therefore not a proper party for the Title IX charges.¹⁴³ The court also stated that "principles of respondeat superior are ill suited for Title IX cases in situations such as the present one," citing the "very limited contact" and distance of the VA officials from the alleged hostile environment.¹⁴⁴ Finally, the court emphasized that Section 1983 was not a statute but merely a "conduit through which individuals may obtain redress for violations to rights protected by the federal constitution or federal law."¹⁴⁵ Therefore, there was no authority for

¹⁴² Id. at 1195-96.

¹⁴³ "The record and plaintiff's prior arguments point to the UPR as the educational institution responsible for the Program. This is the party against which she has always directed the Title IX action. . . . It was clear from the record that the Title IX action was directed at the proper educational institution which was the recipient of federal funds, the U.P.R., and not at the Veterans Administration Hospital which merely permits rotations of the Program's surgery residents through their wards as part of their training at the U.P.R. Program." Id. at 1193.

¹⁴⁴ Id. at 1195.

¹⁴⁵ Therefore, "section 1983 may not be used to sustain an action for violation to Title VII only." Id. at 1195. Since the court was not allowing the plaintiff to bring charges now under Title VII, this reasoning is not completely clear. It may be that the court intended this reasoning to extend to charges under Title IX also.

liability on the part of the VA officials and the VA Hospital.¹⁴⁶

The court summarized the plaintiff's complaints against Dr. Rive-Mora as sexual harassment and reduced operating opportunities alleged after she rejected his sexual advances. These acts were then followed by Dr. Rive-Mora's solicitation of written complaints from VA senior residents, which he forwarded to higher authorities in the Program without allowing the plaintiff to tell her side of the story. The plaintiff contended that Dr. Rive-Mora continued to discriminate against her so that the faculty were influenced to decide to terminate her residency.¹⁴⁷

In reviewing the complaints against Dr. Rive-Mora, the court considered both the quid pro quo and hostile environment modalities of sexual harassment.¹⁴⁸ The court reasoned that such behavior may be actionable under Section 1983, Bivens-type action, and the equal protection component

¹⁴⁶ "The weakness of plaintiff's arguments against the two federal [VA] defendants tends to show that [plaintiff's] true target has always been the U.P.R. Program and the U.P.R. defendants." Id. at 1197.

¹⁴⁷ Id. at 1196.

¹⁴⁸ "Plaintiff claims the record shows [quid pro quo sexual harassment when] Dr. Rive-Mora allowed her to operate more when she responded to his advances but restricted her operations when she rejected him and that his sexual advances and commentaries, as well as those of the staff and residents at the VA Hospital, created a sexually hostile work environment." Id.

of the Due Process Clause of the Fourteenth Amendment.¹⁴⁹ The court also cited Title VII case law and the 1980 EEOC Guidelines on Sexual Harassment as providing interpretation for sexual harassment claims.¹⁵⁰ Two specific requirements noted for actionability of such claims concerned the unwelcomeness of the behavior and an "objective standard of what . . . a reasonable woman's reaction to a similar environment would be" to determine the pervasiveness or severity of the circumstances.¹⁵¹

The court then reasoned that

Neither one of the two core elements for the quid pro quo modality of harassment, demands for sexual favors and conditioning of job benefits upon submission to sexual favors, were shown to have been present in Dr. Rive-Mora's conduct, even assuming they occurred as plaintiff claims. . . . The alleged flirtations could perhaps have been the prelude to such an invitation . . . [but] there is simply no evidence that these 'advances' . . . ever developed into sexual demands.¹⁵²

The court also characterized the plaintiff's theory that she had experienced hostile environment sexual

¹⁴⁹ Id. at 1198.

¹⁵⁰ Id.

¹⁵¹ Id. at 1199.

¹⁵² "Additional facts showing that these casual approaches led to some sexual encounter between them would be needed before it could be reasonably concluded that the contours of a judicially cognizable quid pro quo claim are present. Furthermore, given plaintiff's admittedly favorable responses to these flattering comments there was no way anyone could consider them as 'unwelcome.'" Id. at 1200.

harassment as "basically flawed."¹⁵³ The court stated that the incidents of a "sexual, vulgar" nature that she encountered during her first rotation were not repeated during her second rotation at the VA Hospital. The second rotation encounters were reasoned to stem from the "senior residents' annoyance at her 'aggressive, patient-stealing' practices and her habit of . . . questioning their treatment or diagnosis of patients."¹⁵⁴ The court also characterized the remarks of Dr. Rive-Mora as "flattering" and "neither indecent nor obscene."¹⁵⁵ The court concluded that "the incidents relevant to her hostile environment theory are far removed in degree and pervasiveness from those considered by courts to constitute sex harassment."¹⁵⁶

Accordingly, the court granted the defendants' motion for a summary judgment. The significance of this case stems from the court's recognition of the previously cited two modalities of sexual harassment: quid pro quo and hostile environment. While the court provided disclaimers that Title VII principles could not be transferred to Title IX cases, it did evaluate the plaintiff's complaints using

¹⁵³ Id. at 1203.

¹⁵⁴ Id.

¹⁵⁵ "They portray a treatment based on romantic attraction rather than on a desire to discriminate because of gender." Id.

¹⁵⁶ Id.

definitions of quid pro quo and environmental sexual harassment that were developed in Title VII case law.¹⁵⁷

Of particular significance, however, and indicative of the court's outlook concerning environmental sexual harassment, was the leaving out of the third EEOC definition of sexual harassment while clarifying Title VII case law.¹⁵⁸ This third definition provided a description of actionable environmental sexual harassment.¹⁵⁹ Since the first two definitions described quid pro quo sexual harassment, the court may have still been reacting negatively to the plaintiff's request to view the case in light of the recent Meritor case, which expanded actionable sexual harassment to include environmental sexual harassment.

On appeal of the second and third Lipsett opinions that yielded summary judgments,¹⁶⁰ the court provided a single opinion concerning charges against the commonwealth and

¹⁵⁷ "The sex harassment claim is really a creature of Title VII case law." Id. at 1198.

¹⁵⁸ Id.

¹⁵⁹ This definition indicated that actionable environmental sexual harassment occurs when "such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. Ch. XIV, Pt. 1604, § 1604.11.

¹⁶⁰ 637 F. Supp. 789; Lipsett v. Rive-Mora, 669 F. Supp. 1188.

federal defendants.¹⁶¹ Upon review of "seven thick volumes of motions, depositions, affidavits, and hospital documents," the appellate court reversed the summary judgments and remanded the case for a trial on the merits.¹⁶² The plaintiff had not appealed the summary judgment in favor of the VA Center Director and the VA Director; therefore, they were not subject to the reversal provided by the appellate court.¹⁶³

It was deemed important by the appellate court to clarify at the outset of the opinion the basis for liability for each of the defendants. Specifically,

Plaintiff alleged that she was subjected to sex discrimination by the University through the actions of its agents, in violation of Title IX; by [Drs.] Maldonado, Santiago, Gonzalez, and Blanco, in their individual and official capacities, in violation of 42 U.S.C. § 1983 (the equal protection clause); and by (Dr.) Rive(-Mora), in his individual and official capacities, in violation of the due process clause of the fifth amendment as of 42 U.S.C. § 1983 (the equal protection clause).¹⁶⁴

The appellate court also attached importance to presenting in detail the behavior of "various men not named as defendants" in order to support the decision that the Surgery Program was charged with discriminatory animus

¹⁶¹ 864 F.2d 881.

¹⁶² Id. at 885-86.

¹⁶³ Id. at 884.

¹⁶⁴ Id. at 885.

toward the plaintiff and other women in the Program.¹⁶⁵ This description indicated to the court that it could be found that at least two of the defendants had constructive notice that the Surgery Program had an atmosphere hostile to women.¹⁶⁶

Other circuit court decisions were cited as providing support for applying the Title VII standard for proving discriminatory treatment to claims of sex discrimination under Title IX.¹⁶⁷ The appellate court agreed with this approach and also cited the legislative history of Title IX as indicative of similar Congressional intent for comparable standards to exist under Title VII and Title IX.¹⁶⁸ However, the court limited this interpretation to the context of employment discrimination.¹⁶⁹

The appellate court also drew from other case law to explicate the standards that it imposed on the plaintiff's allegations of sexual harassment. The court cited the Alexander definition of actionable quid pro quo sexual

¹⁶⁵ Id. at 886.

¹⁶⁶ Id.

¹⁶⁷ See the cases of Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311 (10th Cir. 1987), cert. denied, 108 S.Ct.148 (1987); O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986); and Nagel v. Avon Board of Education, 575 F. Supp. 105 (D. Conn. 1983) cited in Lipsett, 864 F.2d at 896-97.

¹⁶⁸ Id. at 897.

¹⁶⁹ Id.

harassment.¹⁷⁰ Meritor was cited as providing a definition of actionable hostile environment sexual harassment, focusing on the requirement of unwelcomeness of such behavior.¹⁷¹ The Rabidue dissent introducing the standard of considering the perspective of the plaintiff and defendant in assessing "unwelcomeness" was also cited.¹⁷²

The court then further applied the Meritor analysis to the liability of institutions under Title IX.

We therefore hold, following Meritor, that in a Title IX case, an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show he or she took appropriate steps to halt it. . . . We further hold that this standard also applies to situations in which the hostile environment harassment is perpetrated by the plaintiff's coworkers.¹⁷³

Concerning the liability of supervisory U.P.R. officials, the court concluded that Title IX liability did not apply to such officials, only to educational institutions. Instead, state officials were then liable under Section 1983 if (a) they directly engaged in sexual harassment or sex discrimination or (b) the behavior of their subordinates resulted in a constitutional violation

¹⁷⁰ Id. at 897.

¹⁷¹ Id. at 897-98.

¹⁷² Id. at 898.

¹⁷³ Id. at 901.

and the official's action or inaction was "affirmatively linked" to such behavior.¹⁷⁴

The court further reasoned that the ruling of the district court concerned "disputed issues of material fact" concerning the charges of sexual harassment and discriminatory discharge.¹⁷⁵ The court concluded that the plaintiff had established prima facie cases of quid pro quo and hostile environment sexual harassment.¹⁷⁶ The court also concluded that the defendants' defense that they were unaware of the alleged harassment was also a disputed issue.¹⁷⁷

Concerning the charges of discriminatory discharge, the court stated that the plaintiff "created a genuine dispute as to the accuracy and truthfulness of the complaints" that

¹⁷⁴ Id. at 901-902.

¹⁷⁵ "By accepting the defendants' assertions in their entirety, the district court turned the summary judgment proceeding into a trial, and acted as a fact finder." Id. at 904.

¹⁷⁶ Id. at 905.

¹⁷⁷ "We find that there was sufficient evidence in the record from which it could be inferred that the atmosphere described by the plaintiff was so blatant as to put the defendants on constructive notice that sex discrimination permeated the program. . . . [For example,] Dr. Gonzalez' dismissal of . . . anti-female remarks as mere 'jest' may demonstrate his insensitivity to them. Belittling comments about a person's ability to perform, on the basis of that person's sex, are not funny. . . . It could be that Dr. Gonzalez thought that the comments in question were mere 'jest,' but his reaction may reveal more about his role in allowing the hostile environment to continue than about whether the comments were 'objectively innocuous'." Id. at 906.

led to her discharge.¹⁷⁸ The court contended that the plaintiff provided direct and indirect evidence that discriminatory bias prompted the complaints.¹⁷⁹ The court reasoned that it could be inferred that the supervising faculty and officials "had succumbed to the 'sexist attitudes and actions' of certain male residents whom the plaintiff alleged had engendered such complaints in an effort to drive her from the Program."¹⁸⁰

The appellate court stated that the holding of the district court concerning claims of sexual harassment against Dr. Rive-Mora was "untenable."¹⁸¹ The reasoning of the district court concerning what determined an actionable claim of sexual harassment prompted the appellate court to state that

The [district] court in effect required that the plaintiff show that she succumbed to the very advances that she claimed to have been resisting in order to prove that Dr. Rive(-Mora) made such sexual demands at all. Without this proof, the court stated, the plaintiff's assertions were

¹⁷⁸ Id. at 909.

¹⁷⁹ Id. at 908-09. Also, "the most striking evidence suggesting the pretextual nature of the resident's complaints, and the awareness by Drs. Blanco and Gonzalez of this pretext, is that both men learned of misconduct committed by male residents that was arguably as serious as that forming the plaintiff's discharge" and either ignored or smiled at the behavior. Id. at 910.

¹⁸⁰ Id. at 911.

¹⁸¹ Id. at 913.

unworthy of credence, a mere "sense" or perception only "in her mind."¹⁸²

The reversal and remand provided by the appellate court was significant for several reasons. The order to apply Title VII standards similar to Meritor to Title IX cases opened institutions to possible increased liability for charges of environmental sexual harassment. The requirement of considering the plaintiff's and defendant's perceptions introduced increased opportunity for plaintiffs to have their claims considered more seriously than the record indicated they previously were.

The reasoning of the appellate court also provided a significant change in the way the plaintiff's claim had been presented. The initial claim focused on the student status of the plaintiff. The holding of the court, "the Title VII standard for proving discriminatory treatment should apply to claims of sex discrimination arising under Title IX is limited to the context of employment discrimination," provided relief based on employment, not student status.¹⁸³ The court was silent concerning the relief available to plaintiffs who were not in a "mixed employment-training context." The court also did not acknowledge the

¹⁸² Id.

¹⁸³ "Plaintiff here was both an employee and a student in the program. In addition to receiving a salary, she was receiving training. We have no difficulty in extending the Title VII standard to discriminatory treatment by a supervisor in this mixed employment-training context." Id. at 897.

student-employee nexus that even allowed the plaintiff to enter the Surgery Program or employment with a hospital.

Before the trial ordered by the appellate court, two other Lipsett opinions were issued. The first concerned a request for expert witness certification requested by the plaintiff.¹⁸⁴ The court denied this request based on what it determined to be a lack of credentials by the proposed witness and the conclusion that the jury did not need such additional testimony.¹⁸⁵ The second opinion concerned a request by UPR for sovereign immunity, which was granted.¹⁸⁶

The last opinion issued for the Lipsett case during the time period of this study occurred after the trial ordered by the appellate court.¹⁸⁷ This post-trial motion included a request for a new trial by the defendants, a request for equitable relief including an injunction ordering the promotion of plaintiff to the fourth year of residency, and a request by Dr. Rive-Mora for attorney's fees.¹⁸⁸ The district court denied each motion.¹⁸⁹

¹⁸⁴ Lipsett v. University of Puerto Rico, 740 F. Supp. 921 (D.P.R. 1990).

¹⁸⁵ Id. at 925.

¹⁸⁶ Lipsett, 745 F. Supp. 793 (D.P.R. 1990).

¹⁸⁷ Lipsett, 759 F. Supp. 40.

¹⁸⁸ Id. at 43.

¹⁸⁹ Id.

The UPR officials and faculty brought five claims concerning a new trial request. The initial claim was perjury and fraud upon the court by the plaintiff.¹⁹⁰ Next, the defendants claimed that the plaintiff unfairly made them the victim of surprise by failure during pre-trial testimony to indicate that the use of certain graphic words and phrases would be used at trial.¹⁹¹ Then the defendants claimed that the senior residents' alleged acts of sexual harassment and discrimination were not performed under "color of state law," thereby not providing a basis for defendants' liability under 42 U.S.C. § 1983.¹⁹² A fourth claim concerned the assertion that the reason for the plaintiff's discharge had been legitimate and nondiscriminatory.¹⁹³ The last reason cited for a new trial concerned a request for qualified immunity based on claims that the law on the sexually hostile environment was not "clearly established at the time plaintiff was discharged from the UPR Surgery Program."¹⁹⁴

¹⁹⁰ Id. at 45-46.

¹⁹¹ Id. at 47-49.

¹⁹² Id. at 49-51.

¹⁹³ Id. at 51-54.

¹⁹⁴ Id. at 54-56.

The court disagreed that the plaintiff had perpetrated perjury or fraud.¹⁹⁵ Concerning the surprise claimed by defendants over plaintiff's testimony, the court reasoned that since the defendants had initially protested, then allowed plaintiff to continue with her testimony, that there was no surprise testimony that deprived the defendants of a fair hearing.¹⁹⁶ The court then stated that the senior residents were also supervisors of the plaintiff, and that by affirmative link defendants incurred liability from the residents' sexual harassment and discrimination toward the plaintiff.¹⁹⁷ Next, the court concluded that a reasonable jury could have found from the evidence at trial that the plaintiff "was dismissed from the program on the basis of her sex."¹⁹⁸

Finally, the court said,

Our review of the relevant case law leads us to conclude that the "contours" of the law related to sexual discrimination under the Equal Protection Clause of the United States Constitution were sufficiently developed so that, when applied to the facts of this case, the defendants reasonably understood that their actions violated the

¹⁹⁵ "The defendants have failed to show any type of unconscionable scheme . . . perpetrated by the plaintiff and her attorneys in an attempt to hamper the administration of justice in this case. . . . Therefore, we conclude that no fraud was committed upon the court." Id. at 46.

¹⁹⁶ Id. at 48.

¹⁹⁷ Id. at 51.

¹⁹⁸ Id. at 51.

plaintiff's constitutional rights to be free from discrimination based on her sex.¹⁹⁹

The court also cited testimony from Dr. Blanco that indicated that the defendant was aware that sex discrimination was prohibited by law.²⁰⁰ Therefore, the court denied the defendants' request for qualified immunity.

The court also denied the plaintiff's request for equitable relief of reinstatement into the Surgery Program's fourth year. The court reasoned that because of the hostilities of the parties in this case and the surgery context "in which people's lives are at stake every day," that a "special consideration" existed that would not usually deny a request for equitable relief.²⁰¹ Therefore, reinstatement was not viewed as an appropriate remedy. The court also concluded that the plaintiff had been adequately compensated by a provision of \$525,000.00 for damages and would be eligible for attorney's fees and costs.²⁰²

Lastly, the court considered the request of Dr. Rive-Mora for attorney's fees. Dr. Rive-Mora claimed "that plaintiff filed and prosecuted this case against him in bad

¹⁹⁹ Id. at 55.

²⁰⁰ Id.

²⁰¹ Id. at 59.

²⁰² Id.

faith," knowing that her allegations were false.²⁰³ Even though the plaintiff did not prevail in this complaint, the court reasoned that her charges were not "frivolous, unreasonable, or without foundation."²⁰⁴ The court reasoned that "although the question of plaintiff's quid pro quo claim was 'close,' the plaintiff raised a 'factual issue to be resolved by the trier of fact'. "²⁰⁵ Therefore, the court concluded that Dr. Rive-Mora was not entitled to attorney's fees from plaintiff.

This case is significant in the emphasis with which it affirms that sexual harassment constitutes sexual discrimination. Of particular significance, however, is that the basis of liability cited was the constitutional protection provided through the Fifth and Fourteenth Amendments.²⁰⁶ While Title IX and Title VII continued to evolve during the plaintiff's eight years of seeking redress, these statutory provisions were not mentioned in the court's reasoning.

Synthesis

In 1972 the passage of Title IX of the Education Amendments prohibited discrimination based on sex in

²⁰³ Id. at 59.

²⁰⁴ Id.

²⁰⁵ Id. at 59-60.

²⁰⁶ Id. at 55.

education settings.²⁰⁷ Not until 1977 did a federal case emerge where sexual discrimination was claimed by a student from sexual harassment in a higher education setting. This case, Alexander v. Yale University,²⁰⁸ provided the first ruling that quid pro quo sexual harassment was a violation of a cognizable Title IX right. The court, however, denied that actionable sex discrimination had occurred from environmental sexual harassment at Yale. Further, it concluded that environmental sexual harassment was not a violation of a cognizable Title IX right.²⁰⁹

Three years after the Alexander ruling, another student brought action claiming discrimination through sexual harassment, in Lipsett v. University of Puerto Rico.²¹⁰ Reasoning that the student's claim of environmental sexual harassment might be developed from "novel" interpretations of Title IX and Title VII of the Civil Rights Act of 1964,²¹¹ the court did not preclude the actionability of such a claim.²¹² Ruling was reserved until additional facts were presented, thereby denying the defendants'

²⁰⁷ 20 U.S.C. § 1681(a).

²⁰⁸ Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980).

²⁰⁹ Id. at 3, aff'd, 631 F.2d at 184.

²¹⁰ 576 F. Supp. 1217.

²¹¹ 42 U.S.C. § 2000e2(a) (1).

²¹² Lipsett, 576 F. Supp. at 1224.

request for summary judgment.²¹³ This initial ruling was significant for creating the possibility that the definition of actionable sex discrimination might be expanded to include environmental sexual harassment.

As the Lipsett case continued to develop for another hearing, the case of Moire v. Temple University School of Medicine²¹⁴ was brought two years later by a student claiming environmental sexual harassment. Relying on the EEOC 1980 Guidelines on Sexual Harassment, the court recognized environmental sexual harassment as a form of sex discrimination.²¹⁵ Significantly, the court's decision to transfer Title VII principles to Title IX claims resulted in the expansion of actionable sex discrimination under Title IX.

Even though the Moire court cited the definition of sexual harassment developed by MacKinnon and stated that environmental sexual harassment was violative of Title IX rights, the concept of environmental sexual harassment was not developed much beyond this definition.²¹⁶ One explanation the court offered concerning the defendant's behavior toward the plaintiff related attraction, not power,

²¹³ Id.

²¹⁴ Moire, 613 F. Supp. 1360, aff'd, 800 F.2d 1136.

²¹⁵ Moire, 613 F. Supp. at 1366, 1367.

²¹⁶ Id. at 1366.

to the allegedly harassing behavior, contrary to MacKinnon's development of sexual harassment legal theory.²¹⁷

The issue of attraction, or lack of it, was sometimes viewed as a mitigating factor in proving liability for environmental sexual harassment. Using the Moire court's logic in assigning culpability, the Bougher district court defined behavior that the plaintiff termed environmentally harassing as problems in a personal relationship.²¹⁸ Conversely, in the third opinion of Lipsett, the court reasoned that since the defendant's comments were of a romantic nature that did express attraction, they were, therefore, not harassing.²¹⁹

A month prior to the affirmation of the Moire district court ruling by the appellate court, a second Lipsett opinion²²⁰ was provided concerning the commonwealth defendants. Although the court cited the Moire district court ruling in reference to the defendants' liability under Title IX and Section 1983 if environmental sexual harassment

²¹⁷ "Dr. Crabtree's decisions, first to transfer, then to fail plaintiff, were inconsistent with a behavior of a person driven by sexual attraction." Id. at 1370.

²¹⁸ Bougher, 713 F. Supp. at 145.

²¹⁹ "Dr. Rive-Mora's flattering remarks or 'piropos' were neither indecent nor obscene. They portray a treatment based on romantic attraction rather than on a desire to discriminate." Lipsett v. Rive-Mora, 669 F. Supp. at 1203.

²²⁰ Lipsett, 637 F. Supp. 789.

had been proved,²²¹ it did not agree with or further explicate the transfer of Title VII principles to Title IX action. Nor did it provide a standard for actions that would rise to a claim of actionable environmental sexual harassment, reasoning that the alleged environmental sexual harassment was merely friction and personality clashes arising from the stress of the Surgery Program.²²² Therefore, the court granted a summary judgment in favor of the commonwealth defendants.

The third Lipsett opinion,²²³ concerning the federal defendants, was provided the next year. In considering the plaintiff's request to transfer the standard for Title VII hostile environment claims recently developed in Meritor to her Title IX claim, the court repeatedly cited deficiencies and a lack of authority in the plaintiff's reasoning.²²⁴ Following this reluctance to interpret Title VII standards as applicable to Title IX claims, the court provided a summary judgment for the defendants that included a standard for environmental sexual harassment that would be difficult to meet.

As part of the review for this claim, the court relied on the same EEOC guidelines used by the Moire court.

²²¹ Id. at 801.

²²² Id. at 798.

²²³ Lipsett v. Rive-Mora, 669 F. Supp. 1118.

²²⁴ Id. at 1193-94, 1199-1200, 1203-04.

However, the court did not provide a complete citation of these guidelines. In the text of the opinion the court stated the first two guideline clauses that provided the definition of quid pro quo sexual harassment, leaving out the last clause that indicated circumstances necessary to state a claim for environmental sexual harassment.²²⁵

Upon appeal, however, the appellate Lipsett court²²⁶ reversed the findings of the second and third Lipsett decisions in an opinion concerning both the commonwealth and federal defendants. Following standards developed in Meritor, the court provided an expansion of liability for environmental sexual harassment in higher education settings.²²⁷ Significantly, the court limited this Title VII application to Title IX claims to the context of employment discrimination.²²⁸

This "quasi-employment" context of the Surgery Program was cited in the second Lipsett opinion²²⁹ as justification for not following general university regulations for hearing grievances; curiously, the recognition of the context of employment did not incline that court to extend Title VII standards to the case, as the

²²⁵ Id. at 1198.

²²⁶ Lipsett, 864 F.2d 881.

²²⁷ Id. at 901.

²²⁸ Id. at 897.

²²⁹ Lipsett, 637 F. Supp. at 811.

appellate court did. Therefore, while the appellate decision provided increased legal means for redress from environmental sexual harassment for students employed by higher education institutions, an area emerged under Title IX concerning unemployed students that was addressed only by the Moire court.

A year after the appellate Lipsett opinion, a fourth student claiming environmental sexual harassment in a different circuit received a different interpretation of the actionability of environmental sexual harassment under Title IX. In Bougher v. University of Pittsburgh,²³⁰ the reasoning of the district court conflicted with the Lipsett appellate court and the Moire court concerning the applicability of Title VII standards to claims brought under Title IX.²³¹ The Bougher opinion at the district level defined violations of Title IX as stemming only from denial of admission or denial of benefits, similar to the reasoning of Alexander defining quid pro quo sexual harassment as the only actionable form of sexual harassment.

At the Bougher appellate court level, the finding that it was unnecessary to reach the question concerning environmental sexual harassment as actionable under Title IX was not clarified.²³² The reasoning of the court that

²³⁰ Bougher, 713 F. Supp. 139, aff'd, 882 F.2d 74.

²³¹ Bougher, 713 F. Supp. at 145.

²³² 882 F.2d at 77.

Title IX corresponded to Title VI²³³ was also expressed earlier by the Alexander district court.²³⁴ This view differed from the Moire and Lipsett courts' interpretations of Congressional intent for Title IX,²³⁵ i.e., a patterning after Title VII. The dissociation of the appellate court from the district court's reasoning is significant, however, in that it did not indicate, as did the district court, that environmental sexual harassment would never be actionable under Title IX.

A ruling on the request of Lipsett defendants for a new trial²³⁶ provided another opinion that environmental sexual harassment provided an actionable claim for students in higher education settings. Since the appellate Lipsett court²³⁷ had ordered the Title VII standard to be applied because of the work environment component of the student's position, Title IX was not the focus for the reasoning used to determine the validity of the new trial request. The defendants' claim that sexual harassment law was not well developed at the time of the student's enrollment was denied, but the court relied on sex discrimination case law

²³³ 42 U.S.C.A. § 2000d, et seq.; 34 C.F.R. § 106.71 (1988).

²³⁴ Alexander, 459 F. Supp. at 5.

²³⁵ Bougher, 882 F. 2d at 77.

²³⁶ 759 F. Supp. 40.

²³⁷ 864 F.2d at 901.

concerning constitutional and Section 1983 claims, not Title VII case law.²³⁸

The last Lipsett case analyzed provided a contrast to the history of Title VII case law used to explicate the concept of environmental sexual harassment in the previously analyzed cases. From the Moire court's statement that "sexual harassment 'doctrine' has generally developed in the context of Title VII,"²³⁹ to the conclusion of the district Bougher court that "the sexual harassment claim is really a creature of Title VII,"²⁴⁰ the concept of environmental sexual harassment seemed well-grounded in Title VII case law.²⁴¹ The Constitutional and Section 1983 case law reviewed in the last Lipsett opinion, however, clarified deeper underpinnings of equity law for the actionability of environmental sexual harassment of higher education students.

In addition to judicial review of the behavior of defendants charged with environmental sexual harassment, the courts considered the action of plaintiffs. Notification of

²³⁸ Lipsett, 759 F. Supp. at 55-57.

²³⁹ Moire, 613 F. Supp. at 1367 n.2.

²⁴⁰ Bougher, 713 F. Supp. at 145.

²⁴¹ See also different interpretations of the same Title VII cases provided by Lipsett, 669 F. Supp. at 1198, and Lipsett, 864 F. 2d at 897-98. The different reasoning may have resulted from the introduction in the latter Lipsett case of the dissent from Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting), that defined the reasonable woman standard.

the authority deemed proper by the court was one responsibility cited for plaintiffs. In one case this meant administrative exhaustion.²⁴² In the same case and another case, this also meant notification of the institution officials.²⁴³

A negative court attitude was discerned toward what was termed "inappropriate" assertive behavior by plaintiffs. Examples of this behavior included attempting to notify university officials about environmental sexual harassment of other students, when the student-notifier had not personally experienced quid pro quo or environmental sexual harassment;²⁴⁴ asking what was perceived as too many questions;²⁴⁵ questioning authority;²⁴⁶ and exhibiting "patient-stealing" behavior that was condoned for male residents.²⁴⁷

The judicial interpretation of alleged Title IX violations in the cases reviewed often focused on the lack

²⁴² Alexander, 631 F.2d at 185.

²⁴³ Id. See also, Lipsett, 637 F. Supp. at 803.

²⁴⁴ Alexander, 631 F.2d at 185.

²⁴⁵ Moire, 613 F. Supp. at 1370; Lipsett, 669 F. Supp. at 1202.

²⁴⁶ Lipsett, 637 F. Supp. at 797.

²⁴⁷ Lipsett, 669 F. Supp. at 1203.

of denial of admission or educational benefits.²⁴⁸ The third prong of Title IX, discrimination on the basis of sex, was generally not explored in terms of environmental sexual harassment until the appellate case of Lipsett.²⁴⁹

Characterizing all of the judicial reasoning was the exclusion of an application of similar behavior to male students. In Alexander there was no questioning of the harm that may be experienced from leaving an athletic team or major for a male student, not to mention the assignment of a property interest to participation in these areas. In Moire it was not questioned if male students would appropriately be called attractive by their professor during a discussion providing feedback on clinical performance. In Bougher the previous alleged sexual relationship with the professor was not assumed to be one uniformly open to or chosen by male and female students. And, in Lipsett, the defendants were not questioned to determine if they directed remarks to male residents that were similar to remarks they directed to female residents. This standard of reasoning was not used to determine unequal treatment based on sex that results from sexual harassment.

The courts' reasoning was also silent in its review of law and legal commentary concerning the actual and specific

²⁴⁸ Alexander, 631 F.2d at 184; see Lipsett, 637 F. Supp. at 797, also 669 F. Supp. at 1200, 1201; and see also Bougher, 713 F. Supp. at 144.

²⁴⁹ Lipsett, 864 F.2d 881.

harm experienced from environmental sexual harassment. The court did not provide reasoning on how environmental sexual harassment experienced in work settings differed significantly from environmental sexual harassment experienced in education settings in terms of level and type of harm. Nor did the courts explain how different settings merited different sanctions for comparable examples of environmental sexual harassment.

Summary

The cases analyzed in this study are important for the identification of the evolution of the legal concept of environmental sexual harassment of higher education students by faculty. This analysis has resulted in an identification of four historic legal periods in the evolution of this legal concept.

The first period began in 1972 with the passage of Title IX of the Education Amendments, which prohibited sex discrimination in education settings. During this period, opinions provided in the Alexander case established that freedom from environmental sexual harassment for higher education students was not a legally cognizable Title IX right. This period endured for almost half the time of the cases under review in this study.

An openness to considering that environmental sexual harassment might be a violation of Title IX characterized the second period. This period began in 1983 with the first

Lipsett ruling, which did not dismiss a claim concerning environmental sexual harassment brought under Title IX. The court's request for additional facts before providing a ruling indicated that, in the reasoning of that particular court, the possibility existed that environmental sexual harassment of higher education students by faculty might be a violation of a cognizable Title IX right.

In 1985 the third period began with the opinion of the Moire district court, establishing that environmental sexual harassment of students was a violation of Title IX through the transfer of Title VII principles. The reasoning of this period was shortly challenged by decisions of the next period.

Beginning in 1986, two standards emerged in the fourth period of the evolution of this legal concept. In the Third circuit, a return to the holding that environmental sexual harassment was not a violation of a cognizable Title IX right was provided in the opinions of Bougher. In the concluding opinions of Lipsett, the First circuit held that environmental sexual harassment of higher education students was a violation of Title IX in the context of student employment discrimination claims. This period covered the last five years of the period under review in this study.

During the last period a clear ruling was not provided for the status of environmental sexual harassment claims by the student not employed by the higher education

institution. The explication of sexual harassment case law provided in the concluding post-trial opinion of Lipsett indicated that well-established sex discrimination case law from Constitutional and Section 1983 claims supported the right to freedom from discrimination based on sex. This focus for sexual harassment claims, including environmental sexual harassment, has also been recommended by MacKinnon and may well serve such students not employed by the higher education institution.

CHAPTER V
ANALYSIS USING MACKINNON'S THEORY OF
SEXUAL HARASSMENT AS SEX DISCRIMINATION

MacKinnon's development of the legal theory that defined sexual harassment as sex discrimination relied on the legal basis that different treatment based on sex was unlawful discrimination.¹ She, therefore, reasoned that jurisprudence prior to the establishment of legal relief for sex discrimination was characterized by "dominance" theory.² By this she meant that law was enacted and interpreted from the viewpoint of the socially dominant gender, which often had not viewed different treatment based on sex as discriminatory.³

Three main elements of MacKinnon's legal theory have been used in this study in the legal analysis of cases concerning sexual harassment of higher education students by faculty. The first element concerned the plaintiff's civil rights status, concerning freedom from discrimination on the basis of sex.⁴ A second element involved a determination

¹ Catharine MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (New Haven: Yale University Press, 1979): 6.

² MacKinnon, Sexual Harassment, 5.

³ Ibid.

⁴ Ibid., 233-238.

of whether the defenses used against claims of sexual harassment fell within those central to sex discrimination doctrine or, instead, within what MacKinnon defined as "ideological constructs" without legal basis.⁵ The legal basis for the judicial reasoning provided the third element used in the legal analysis.⁶

Therefore, this legal analysis answered the following questions:

1. Did the plaintiff request and/or did the court recognize the civil right to freedom from discrimination on the basis of sex established by Title VII, Title IX, or the Fourteenth Amendment?

2. Did defenses to charges of sexual harassment fall within MacKinnon's categorization of ideological constructs or within defenses acceptable in sex discrimination doctrine?

3. Was judicial reasoning based on the Equal Protection Clause of the Fourteenth Amendment, Title VII, and/or Title IX in order to determine if different treatment on the basis of sex occurred?

Analysis of Civil Rights Status of Students

In each of the four cases analyzed, the student plaintiff sought relief under Title IX of the Education

⁵ Ibid., 83.

⁶ Ibid., 223.

Amendments of 1972.⁷ However, only in the Alexander case was Title IX the only source of relief cited for a claim. The other plaintiffs also brought claims, variously, under Section 1983 of the Civil Rights Act of 1871, Title VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fifth and Fourteenth Amendments.⁸ In Alexander the court recognized the students' civil rights status to bring a claim under Title IX for quid pro quo charges but not for environmental sexual harassment charges.⁹ The Moire court, however, recognized the student's civil rights status to bring a claim under Title IX for both quid pro quo and environmental sexual harassment.¹⁰ In the opinion of the Bougher district court, claiming quid pro quo sexual harassment was recognized as a valid civil right under Title IX; the civil right of bringing environmental sexual harassment charges under Title IX was not allowed.¹¹ In

⁷ Bougher v. University of Pittsburgh, 713 F. Supp. 139, 141 (W.D. Pa. 1989); Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360, 1366 (E.D. Pa. 1985); Lipsett v. University of Puerto Rico, 576 F. Supp. 1217, 1219 (D.P.R. 1983); Alexander v. Yale Univ., 459 F. Supp. 1, 2 (D. Conn. 1977).

⁸ Bougher v. University of Pittsburgh, 713 F. Supp. 139, 141 (W.D. Pa. 1989); Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360, 1366 (E.D. Pa. 1985); Lipsett v. University of Puerto Rico, 576 F. Supp. 1217, 1219 (D.P.R. 1983).

⁹ 459 F. Supp. at 3.

¹⁰ 613 F. Supp. at 1366.

¹¹ 713 F. Supp. at 143-45.

the Bougher appellate opinion, the court chose not to rule on the civil right to state an environmental sexual harassment claim under Title IX.¹²

In the first decision of Lipsett, the court initially considered the charge of a Title IX violation from environmental sexual harassment novel, but possibly actionable; it subsequently ruled in a fourth opinion that hostile environment sexual harassment was actionable in Title IX mixed employment-education cases by application of Title VII standards.¹³ Therefore, Lipsett recognized that students employed by their higher education institution could claim the civil right to freedom from sexually harassing environment.

Analysis of Defenses Against Claims
of Environmental Sexual Harassment

MacKinnon proposed that the defenses previously used in work setting sexual harassment cases were ideological constructs. The ideological constructs were categorized by MacKinnon as considering the complaint personal, considering the actions complained of as biological or natural, defining the actions complained of as not company policy, and administrative concern for overloading the judicial system.¹⁴

¹² 882 F.2d 74, 77 (3d Cir. 1989).

¹³ 576 F. Supp. at 1244; Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

¹⁴ MacKinnon, Sexual Harassment, 83-99.

In reviewing each of the cases of this study, defenses were listed and categorized according to MacKinnon's "ideological constructs." The researcher found some defense categories not listed by MacKinnon. Table 3 contains a summary of the application of MacKinnon's ideological constructs to the defenses offered in the higher education cases reviewed in this study. See the appendix for a listing of defense categories by case.

Table 3

Summary of Application of MacKinnon's Work Setting
Defenses to Higher Education Defenses Against Claims
of Environmental Sexual Harassment

<u>Administrative System</u>	<u>Administrative Procedure</u>
6	10*
<u>Not a Policy</u>	<u>Personal</u>
9	18
<u>Sovereign Immunity</u>	<u>Qualified Immunity</u>
3**	3**
<u>Biological/Natural</u>	
0	

* New division of defense category previously identified.

** New defense category not previously identified by MacKinnon.

The category of administrative defense that MacKinnon initially defined as designed to keep sexual harassment cases from overloading the judicial system¹⁵ was divided by the researcher in this study into two subcategories: administrative systems and administrative procedural defenses. Administrative system defenses were defined as those defenses already in place that prevented the current charge of environmental sexual harassment, such as the claimed inapplicability of the law invoked by the plaintiff. Administrative procedural defenses were defined as legal technical errors in the procedure of the case that were claimed to prevent suit, such as the incorrect listing of a name of a defendant when action was brought.

Sovereign immunity and qualified immunity were identified in the higher education cases as two defenses not described by MacKinnon for work setting cases. While both defenses have a legitimate, and not ideological, basis, judicial reasoning did not always share the defendants' view of the appropriate use of the qualified immunity.¹⁶ One defense used in work settings, the natural/biological argument, was not used at all in the higher education cases. Interestingly, the majority of defenses in the higher

¹⁵ MacKinnon, Sexual Harassment, 95-99.

¹⁶ Lipsett v. University of Puerto Rico, 759 F. Supp. 40 (D.P.R. 1991), at 54-55.

education cases concerned either administrative or personal issues.

It should be noted that individual Lipsett opinions greatly outnumber the other three cases and contributed more defenses. The Lipsett case spans nearly the entire time under review, so any legal influence from time and history on the defenses offered in the other three cases may also be reflected in the Lipsett defenses.

The introduction of the immunity defenses appeared only as it became apparent that the plaintiff would or could continue to state a claim alleging environmental sexual harassment.¹⁷ The lack of natural/biological defenses may reflect the fact that quid pro quo sexual harassment was claimed infrequently in the cases under review. It may also reflect an educational environment that has dismissed reasoning that MacKinnon described from her earlier review in work settings.

Analysis of Judicial Reasoning

MacKinnon theorized that judicial reasoning in cases where sexual harassment was alleged should focus on discerning if different treatment occurred on the basis of

¹⁷ This was evident in the first Lipsett opinion, where the court declined to dismiss the case. Lipsett, 576 F. Supp. at 1223. See Lipsett v. Rive-Mora, 669 F. Supp. 1188, 1191 (D.P.R. 1987); Lipsett, 745 F. Supp. 793, 794 (D.P.R. 1990); and Lipsett, 759 F. Supp. 40, 49 (D.P.R. 1991). See also Bougher v. University of Pittsburgh, 882 F. 2d 74 (3rd Cir. 1989).

sex.¹⁸ The four cases were reviewed to determine if the four questions concerning unequal treatment developed by MacKinnon were present in the judicial reasoning.¹⁹ The four questions were (a) was there a differentiation in treatment, (b) did it deprive the complainant(s), (c) was it based on sex, and (d) was it justified (not in violation of Title VII, Title IX, or the Fourteenth Amendment).

Only after the appellate decision of Lipsett²⁰ did a court reason that a plaintiff in the cases reviewed experienced a differentiation in treatment. In the remainder of cases the court reasoned that the plaintiffs were not treated differently,²¹ that the concept of environmental sexual harassment was imponderable,²² or that the university received sovereign immunity²³. Significantly, while the Alexander and Moire cases provided definitions of quid pro quo and environmental sexual harassment, in both cases the plaintiffs were not found to have been treated differently.

¹⁸ MacKinnon, Sexual Harassment, 4-5.

¹⁹ Ibid., 223.

²⁰ 864 F.2d 881, 905-07 (1st Cir. 1988).

²¹ Bougher, 713 F. Supp. 139, aff'd 882 F.2d 74; Moire, 613 F. Supp. 1360, aff'd 800 F.2d 1136.

²² Alexander, 459 F. Supp. 1, aff'd, 631 F. 2d 178.

²³ Lipsett, 745 F. Supp. 793.

The Lipsett trial court also reasoned that the plaintiff's treatment was based on sex.²⁴ Therefore, the plaintiff's treatment was not justified under Title IX. In the four cases reviewed, only the Lipsett plaintiff was found to have stated a claim concerning environmental sexual harassment that the court accepted as depriving the student of freedom from discrimination based on sex.

The reasoning of the Lipsett appellate court appeared to follow the logic suggested by MacKinnon. It was apparent from the review of cases alleging environmental sexual harassment, however, that the basis to state a claim hinged on the court recognizing proven differentiation on the basis of sex.

Summary of Analyses of MacKinnon's Theory

The civil right of students to freedom from environmental sexual harassment was recognized in the Moire case and the Lipsett case. In the Moire case, however, the plaintiff was found not to have an actionable claim. The Lipsett court ruled that the plaintiff did have an actionable claim.

The defenses categorized by MacKinnon for charges of sexual harassment in the work place were not completely applicable to environmental sexual harassment charges in the education setting. The biological/natural defense was not used by defendants in the cases under review. A different

²⁴ 759 F. Supp 40.

category of defense, concerning sovereign and qualified immunity, was introduced by the higher education defendants. The lack of the biological/natural defense and the introduction of the immunity defense indicated that, while most of the work setting defenses categorized by MacKinnon applied to the higher education setting, some differences in the settings may influence how defendants plead their case.

Although the Moire court cited MacKinnon's definition of sexual harassment, none of the courts' reasoning explicitly detailed MacKinnon's reasoning to arrive at a violation of Title IX through a ruling on environmental sexual harassment. However, in the Lipsett case, once a differentiation by sex was established, MacKinnon's legal theory concerning sexual harassment as sexual discrimination was affirmed by the court's finding of a violation of the civil right to freedom from discrimination based on sex. This should indicate to plaintiffs and defendants that the factual establishment of differentiation on the basis of sex can determine the cause to state and pursue a claim.

CHAPTER VI CONCLUSIONS AND RECOMMENDATIONS

The purpose of this study was to identify and analyze the evolution of the legal concept of environmental sexual harassment of higher education students by faculty. To accomplish this purpose, relevant federal cases were identified through legal research. These cases were then analyzed to identify the legal principles and reasoning used to arrive at a decision. A second analysis applied MacKinnon's legal theory of sexual harassment as sex discrimination, developed from work setting sexual harassment cases before 1980 to the identified higher education cases. The research questions of this study concerned the appropriateness of MacKinnon's theory for providing understanding of the evolution of this legal concept in the higher education setting. The analyses contributed to the conclusions and recommendations presented in this chapter.

Conclusion on the Basis of the Legal Analysis

A major task of this study was determining the judicial reasoning of each case. After this determination, the reasoning was broken down into four chronological legal periods of different judicial reasoning that constitute an evolution of the legal concept of environmental sexual

harassment of higher education students by faculty. These periods of judicial reasoning reflected the determination of the actionability of environmental sexual harassment as a civil rights violation.

The first period occurred when the Alexander court¹ indicated that environmental sexual harassment was not an actionable violation of civil rights. In the second period the first Lipsett opinion² determined that the possibility existed that environmental sexual harassment of students might be a civil rights violation. The Moire court³ ruling, specifying that actionable sexual harassment occurred in two forms, quid pro quo and environmental, initiated the third legal period.

The fourth period contained the remainder of cases reviewed and reflected the split in judicial reasoning between circuit courts concerning the actionability of environmental sexual harassment as a civil rights violation. The opinion of the Bougher case⁴ indicated that environmental sexual harassment was not a civil rights

¹ Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980).

² Lipsett v. University of Puerto Rico, 576 F. Supp. 1217 (D.P.R. 1983).

³ Moire v. Temple Univ. Sch. of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986).

⁴ Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989), aff'd, 882 F.2d 74 (3d Cir. 1989).

violation. However, the appellate Lipsett decision⁵ held that environmental sexual harassment was actionable in the context of the student's employment by the university.

Conclusions on the Basis of an
Analysis Using MacKinnon's Theory

An second analysis of the relevant federal cases was based on MacKinnon's legal theory of sexual harassment as sex discrimination. The three foci for the analysis were recognition of the civil right to freedom from sexual harassment, defenses offered against charges of sexual harassment, and judicial reasoning.

MacKinnon proposed that freedom from sexual harassment should be legally recognized as a civil right. In each of the cases reviewed, the plaintiffs asserted the civil right to freedom from environmental sexual harassment. In two cases, Alexander and Bougher, the courts indicated that the concept of the civil right to freedom from environmental sexual harassment was not legally recognized or that the claim did not reach the question of environmental sexual harassment as a violation of Title IX. In the cases of Moire and Lipsett, the concept of environmental sexual harassment as a violation of Title IX was judicially recognized, although with different reasoning.

MacKinnon theorized that defenses against charges of sexual harassment should be patterned after defenses

⁵ 864 F.2d 881 (1st Cir. 1988).

established as appropriate in sex discrimination doctrine. She characterized those defenses that did not as presenting ideological arguments. The defenses offered in the higher education cases against charges of environmental sexual harassment fell within all but one of the categories identified by MacKinnon for work settings. No higher education case defenses were offered that environmental sexual harassment was the result of a natural/biological drive on the part of the defendants. The defenses of sovereign and qualified immunity were also introduced in the higher education cases.

MacKinnon also recommended that the courts determine if different treatment on the basis of sex occurred when considering sexual harassment charges. The courts, in their judicial reasoning did not always use the analysis recommended by MacKinnon. Since in half of the cases, Alexander and Bougher, the court denied that environmental sexual harassment was an actionable violation against Title IX, an opportunity was therefore precluded to determine if there was a differentiation on the basis of sex. The Moire court reasoned that the alleged differentiation did not exist, and therefore did not ascertain whether the alleged differentiation could have been concluded to exist based on sex. Only in the Lipsett case were MacKinnon's recommendations for judicial reasoning considered. At trial after the Lipsett appellate decision, the jury concluded

that the plaintiff had suffered a violation of civil rights due to environmental sexual harassment. The seventh opinion provided in the Lipsett case followed the appellate decision and affirmed the reasoning suggested by MacKinnon, denying judgment n.o.v. to the defendants.

An Integration of Two Analyses

An analysis of the judicial reasoning of the relevant cases resulted in the identification of four legal periods in the evolution of the legal concept of environmental sexual harassment concerning higher education students. An analysis of the same cases using MacKinnon's legal theory showed that only in the Lipsett and Moire cases was there recognition that environmental sexual harassment was unequal treatment based on sex as theorized by MacKinnon. Additionally, only the appellate court of Lipsett considered the same legal questions that MacKinnon recommended concerning the treatment of the student.

In each of the cases reviewed, students asserted their civil right to freedom from environmental sexual harassment, even those students who brought action in Alexander which was heard before MacKinnon's legal theory was completely developed. Therefore, throughout the evolution of this legal concept, persons claiming to experience environmental sexual harassment viewed it as a civil rights violation well before it was held to be so in education settings.

The theory of dominance described by MacKinnon for work setting cases was also apparent in the judicial reasoning of the higher education cases. The perceptions of the female students were often ignored or trivialized in favor of defendants' or judicial interpretation of the alleged behavior. Repeated judicial acceptance and affirmation of the defendants' perceptions, without the consideration of interpretations of such behavior by the "reasonable female student," contributed to rulings most often dominated by the perception of those defending, not alleging, a civil rights violation. This judicial reasoning is well described by MacKinnon's dominance theory.

An approach to understanding the evolution of the environmental sexual harassment concept was provided by a comparison of MacKinnon's work setting defenses to the defenses used in the higher education cases. It is beyond the scope of this study to determine why the biological/natural defense used in work setting suits was not offered in higher education setting defenses. It could be conjectured that this resulted from the difference between the education levels of those defendants in work settings as compared with those in higher education, the nature of higher education environment, or the familiarity of attorneys with MacKinnon's legal theory developed in 1979 when she categorized the work setting defenses.

The introduction of the immunity defense, however, may reflect the nature of the education environment. The sovereign immunity defense may be presented more often by education institutions which often operate as an arm of the state and can claim Eleventh Amendment protection. Availing themselves of the defense of qualified immunity, on the basis of ignorance of a plaintiff's right, however, is inconsistent with the nature of higher education institutions. In this setting the level of knowledge of faculty is higher than the general work population and professional ethics support nonabusive relationships with students.

In summary, the analyses of this study indicated that student plaintiff complaints agreed with MacKinnon's theory that environmental sexual harassment is a civil rights violation from unequal treatment based on sex. Two courts agreed in theory. Two other courts did not accept this theory.

Therefore, the following answers were provided to the research questions of this study:

1. The theories of power and civil rights developed by MacKinnon, concerning sexual harassment in work settings, appear appropriate for providing an understanding of the development of the legal concept of environmental sexual harassment in the higher education setting. Higher education environmental sexual harassment case law was found

to be similar in the initial lack of civil rights for plaintiffs bringing claims of sexual harassment to that reported by MacKinnon in work setting case law. This lack of civil rights initially left students without legally recognized power to pursue claims of environmental sexual harassment. As in the work setting cases, however, a student plaintiff has obtained judicial recognition of the civil right to freedom from environmental sexual harassment. Given the outcome of the Lipsett case, it seems reasonable to expect that higher education environmental sexual harassment case law will expand the power of civil rights available to students in a similar fashion to work setting sexual harassment case law.

2. The absence of the natural/biological defense in the higher education cases may be interpreted to indicate that the higher education defenses are evolving from the categories identified by MacKinnon for work settings. However, a preponderance of higher education defenses in these cases fell into categories identified by MacKinnon. Therefore, it can be concluded that the higher education defenses have not evolved very far at all from the categories identified by MacKinnon.

3. The judicial reasoning analyzed in the higher education cases is consistent with the early judicial reasoning identified by MacKinnon for work setting cases. As in many of the work setting cases, the reasoning of the

opinions did not focus on the effect of the experience if similar behavior were directed to male students; nor was the validity of the plaintiff's interpretation of the alleged behavior recognized in the reasoning. With the exception of the last Lipsett opinions, the courts did not reason that the differentiation based on sex alleged by the plaintiff proved actionable environmental sexual harassment.

Gaps were identified between recommendations by MacKinnon for judicial reasoning and actual reasoning in the cases reviewed. These gaps will most likely be bridged through adherence to legislation enacted late in and after the period under review and the landmark Supreme Court ruling concerning damages available under Title IX provided in Franklin v. Gwinnett County Public Schools⁶ after the period under review. The synthesis of findings from both analyses enriched the understanding of how and why this legal concept has evolved.

Conclusions

The conclusions based on the analyses conducted in this study pertain only to the period under review and may not be generalized to other settings or different parties alleging sexual harassment in higher education, such as faculty. The following conclusions are derived from the findings of this study:

⁶ 911 F.2d 617 (11th Cir.1990), rev'd, ____ U.S. ____ (1992).

1. Judicial reasoning evolved through four discernable legal periods:

- a. From 1972 to 1983 environmental sexual harassment was not held to be a violation of civil rights of students in higher education settings;
- b. From 1983 to 1985 environmental sexual harassment was held to be a possible violation of civil rights of students in higher education settings;
- c. From 1985 to 1986 environmental sexual harassment was held to be one of two forms of actionable sex discrimination and therefore a violation of civil rights of students in higher education settings.
- d. Since 1986 environmental sexual harassment has been considered a violation of civil rights of students in higher education settings by the First Circuit but not by the Third Circuit. Within the circuit recognizing environmental sexual harassment as a civil rights violation, this ruling is limited to the student-employment context.

2. An analysis of the cases using MacKinnon's legal theory indicated that the theory of dominance identified by MacKinnon in work setting sexual harassment cases was also supported in higher education environmental sexual

harassment cases. Defenses previously categorized by MacKinnon for work settings were found to be descriptive of higher education defenses, with the exception of the lack of the defense of a natural/biological inclination of the defendant in the higher education cases. The defenses of sovereign and qualified immunity were also introduced in the higher education cases.

3. The evolution of the legal concept of environmental sexual harassment of higher education students by faculty was not a smooth legal progression marked by ever continuing agreement in judicial interpretations of student civil rights. However, the evolution of this legal concept, as it pertains to higher education students, can be characterized by a shift in the focus of judicial interpretation of Title IX of the Education Amendments of 1972. Initial judicial interpretations of sex discrimination under the first two prongs of Title IX focused on discriminatory behavior that precluded access to admission or participation in the benefits of higher education. The quid pro quo concept of sexual harassment was developed from this interpretation. Later judicial interpretations of sex discrimination under the third prong of Title IX focused on discriminatory behavior not precluding access to admission or participation in the benefits of higher education. The environmental sexual harassment concept was developed from this interpretation.

4. The use of MacKinnon's legal theory provided increased understanding of the evolution of higher education environmental sexual harassment law. The initial civil rights status of students, the majority of defenses used against charges of environmental sexual harassment, and initial judicial reasoning were comparable to those found in the early work setting cases described by MacKinnon.

Recommendations

Legal interpretation of discrimination based on sex in higher education has focused largely on the Title IX prohibition of "exclusion from participation," slightly on the "denial of benefits," and a little on the concept of "discrimination" denying benefits of the environment after access was gained. The concept of discrimination experienced from sexual harassment in the environment has evolved from quid pro quo definitions to include environmental sexual harassment definitions. The relevant cases analyzed for this study have indicated that the concept of environmental sexual harassment as a civil rights violation has been legally established but judicially unsettled for the period under review.

Therefore, higher education institutions and administrators should note the continued development of this legal concept. Legal reasoning used to limit the scope and application of liability has expanded since these cases were reported, most recently with the landmark Supreme Court

Franklin⁷ case providing the opportunity to seek damages for Title IX violations. Repeated reference throughout the cases analyzed tied liability and enforcement to reliance on Title VI legislation concerning handicap discrimination and Title VII legislation concerning sex discrimination in work settings. Such reasoning did not anticipate that stronger Congressional language would emerge concerning discrimination in the 1991 Americans With Disabilities Act. Likewise, the Civil Rights Act of 1991 now provides an opportunity for a different judicial interpretation concerning punitive damages from sex discrimination in work settings.

Educators and administrators should be aware of the capacity of the environment to be discriminating. Title VII law has evolved to include the "reasonable woman" standard⁸ for interpreting the behavior and effects of the environment. It is reasonable to conclude that the perception of the "reasonable female student" will increase in power over the status accorded it in the cases analyzed. (Environmental sexual harassment can also be experienced by the "reasonable male student;" if such a case becomes reported at the federal level this standard may emerge.)

⁷ 911 F.2d 627 (11th Cir.) (1990), rev'd, _____ U.S. (1992).

⁸ Rabidue v. Osceola Refinery Co., 805 F.2d 622 (6th Cir. 1986) (Keith, J., dissenting), cert. denied, 481 U.S. 1041 (1987); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

Therefore, it is recommended that educators and administrators become knowledgeable about the "common civil rights enforcement scheme" suggested in the Lipsett case.⁹ Such an enforcement requirement for civil rights seems to be emerging, although not without challenge, through the enactment of the Civil Rights Act of 1987, the above mentioned Civil Rights Act of 1991, the 1991 Americans With Disabilities Act, and the landmark Franklin case. Effective and nondiscriminatory higher education institutions would seem to require and benefit from educators and administrators possessing a theoretical understanding of such laws under which they are liable.

The theoretical development of the concept of environmental sexual harassment of higher education students by faculty has suggested further areas of research. Other research issues raised in the course of this study would increase the theoretical understanding of this concept but were beyond the scope of this study. The following areas of research are recommended:

1. Even though federal suits were brought mostly by graduate or medical students with a likelihood of liberty or property interests, it should not be reasoned, and the literature does not support, that these students are the only students experiencing environmental sexual harassment.

⁹ Lipsett, 669 F. Supp. 1188, 1193 (D.P.R. 1987).

What other variables are involved that deter other students from bringing suit?

2. Legislation and the cases analyzed in this study cite different liabilities for environmental sexual harassment based on the education or work setting. Does the law as established provide reasoning, or is there other evidence, that the level or degree of harm experienced from environmental sexual harassment differs significantly dependent upon type of setting?

3. A student new to the higher education setting may reason that the environment meets the legal requirements of providing no discrimination on the basis of sex, assuming that if the environment were sexually harassing it would have been challenged and remedied before his or her enrollment. Can research support this assumption? And, if it does not, what are the implications for higher education institutions that allege understanding of and compliance with Title IX of the Education Amendments of 1972?

4. The theory of MacKinnon used in this study was based on cases of work setting law decided before 1980. The majority of education cases in this study were decided in or after 1980. A replication of MacKinnon's research on the next ten years of work setting case law and a comparison of those findings to a comparable period of higher education sexual harassment case law would indicate if higher

education sexual harassment case law continues to provide less redress for students than that found in work settings.

Epilogue

The topic of this study was decided in the summer of 1990. Recent national events concerning the Hill-Thomas Senate hearings during the consideration of the appointment of Clarence Thomas to the Supreme Court in the fall of 1991 might now provide an understanding and perception of the concept of environmental sexual harassment not available during the period of cases under review. Therefore, the period of time of this study, beginning with the Education Amendments of 1972 and ending with the 1990-1991 Supreme Court session, will now define the early theoretical understanding of the evolution of the concept of environmental sexual harassment. Subsequent research concerned with providing a theoretical understanding of the concept of environmental sexual harassment of higher education students by faculty will be marked by an increased judicial and public awareness of the concept of environmental sexual harassment provided by the Hill-Thomas hearings. The effect of this national event should provide a separate chapter of research to contribute to the initial understanding of the evolution of this legal concept.

Another influence to be reckoned with after this study's period of review is the possibility of pursuing

damages provided under Franklin.¹⁰ Institutions, faculty, and administrators have just received a wake-up call from the Franklin case that will most likely result in greater care to meet the requirement of nondiscrimination on the basis of sex in educational institutions everywhere. Certainly, the defense of qualified immunity will lack credibility from this case forward.

¹⁰ 911 F.2d 627 (11th Cir. 1990), rev'd, ____ U.S. ____ (1992).

APPENDIX
APPLICATION OF MACKINNON DEFENSE CATEGORIES
TO HIGHER EDUCATION CASE DEFENSES

Defense	Case Location	Defense Category
Alexander v. Yale Univ.	459 F.Supp.1	
No right to sue properly implied	at 2	Admin. Sys.
No legislative intent	at 5	Admin. Proc.
Lack of administrative exhaustion by plaintiff	at 6	Admin. Proc.
	631 F. 2d 178	
Lack of standing	at 183	Admin. Proc.
Major relief in place/granted	at 184	Not a Policy
Corroborating student lied	at 186	Personal
Moire v. Temple Univ.	613 F. Supp. 1360	
Denial of statement of attraction to student	at 1367	Personal
Intent of support before negative feedback	at 1367	Personal
Gag order to protect patients fm. plaintiff	at 1371	Not a Policy
General standards applied to all students	at 1375	Not a Policy
Bougher v. Univ. Pitt.	713 F. Supp. 139	
Psychological condition of student	at 141	Personal

Denial of general allegations	at 142	Personal
Failure to state claim	at 142	Admin. Proc.
Claims are time-barred	at 142	Admin. Proc.
Univ. didn't receive federal funding	at 142	Admin. Proc.
Qualified immunity	at 142	Qual. Immun.
Eleventh Amendment	at 142	Sov. Immun.
Lipsett v. U. Puerto Rico	576 F. Supp.1217	
No cause of action stated	at 1219	Admin. Sys.
No knowledge of actions/attitudes	at 1219	Not a Policy
Decision from valid reason and fair proceeding	at 1219	Not a Policy
Sovereign Immunity	at 1223	Sov. Immun.
Inapplicability of law invoked	at 1223	Admin. Sys.
Incorrect name on document	at 1223	Admin. Proc.
VA not corporate body	at 1223	Admin. Proc.
	637 F. Supp. 789	
Small quarters only at one hospital, not one in suit	at 797	Not a Policy
Disproportion of women residents not policy	at 797	Not a Policy
Other female resident satisfied w. program	at 797	Personal
Difficulty of plaintiff to "bow to authority"	at 797	Personal
Denial of harassment by other female resident	at 798	Personal
Probationary status of plaintiff	at 808	Personal

	669 F. Supp. 1188	
Defendant conduct not harassing, unequal	at 1191	Personal
Claims are time-barred	at 1191	Admin. Proc.
Frequency of operating unaffected by plaintiff rejection of defendant	at 1191	Not a Policy
Qualified immunity	at 1191	Qual.Imm.
	864 F.2d 881	
Defendants not perpetrators	at 902	Personal
Disproportion of women not a policy	at 904	Not a Policy
Defendants unaware of alleged harassment	at 904,906	Personal
Dismissing remarks as jest	at 906	Personal
	745 F. Supp. 793	
Sovereign immunity	at 794	Sov. Imm.
	759 F. Supp. 40	
Plaintiff committed perjury	at 44	Personal
Unfair surprise by plaintiff's language	at 47	Admin. Proc.
Harassment not under color of state law	at 49	Not a Policy
Legitimate reason for dismissing plaintiff	at 49	Not a Policy
Qualified immunity	at 49	Qual. Imm.
Witness testimony inadmissible	at 57	Admin. Proc.
Plaintiff failure to mitigate damages	at 58	Personal

REFERENCES

- "Academy Told to Improve Its Treatment of Women." Chronicle of Higher Education, 17 October 1990, A-2.
- Biaggio, Mary Kay, Deborah Watts, and Arlene Brownell. "Addressing Sexual Harassment: Strategies for Prevention and Change." In Ivory Power: Sexual Harassment on Campus, ed. Michele Paludi, 213-230. New York: State University of New York Press, 1990.
- Black's Law Dictionary, 6th ed. St. Paul, Minn.: West Publishing Co., 1990.
- Blum, Debra E. "Law Professor Who Was Accused of Harassment Quits at Emory U." Chronicle of Higher Education, 10 April 1991, A-14.
- "Bush Accepts Compromise on Civil Rights Legislation." Florida Times Union, 26 October 1991, 1.
- Caldwell, Theresa M. "Virginia Principals and School Law." Ph.D. diss., Virginia Polytechnic Institute and State University, 1986.
- Carroll, Lynne, and Kathryn L. Ellis. "Faculty Attitudes Toward Sexual Harassment: Survey Results, Survey Process." Initiatives 52, no.3 (Fall 1989): 35-42.
- Cole, Elsa K. "Recent Legal Developments in Sexual Harassment." Journal of College and University Law 13, no.3 (1986): 267-284.
- Cole, Elsa K., ed. Sexual Harassment on Campus: A Legal Compendium, 2d ed. Washington, D.C.: National Association of College and University Attorneys, 1990.
- Connolly, Walter B., and Alison B. Marshall. "Sexual Harassment of University or College Students by Faculty Members." Journal of College and University Law 15, no.4 (1989): 381-403.
- Cooper, Lisa H. "French Teaching Program Labeled Sexist." U: The National College Newspaper from the Amherst Student, Nov.-Dec. 1990, 1,7.

- Defour, Darlene C. "The Interface of Racism and Sexism on College Campuses." In Ivory Power: Sexual Harassment on Campus ed. Michele Paludi, 45-42. New York: State University of New York Press, 1990.
- Dembry, Lela. "In Her Own Words: One Woman Student's Experience With Sexual Harassment." In Ivory Power: Sexual Harassment on Campus ed. Michele Paludi, 183-189. New York: State University of New York Press, 1990.
- Dozier, Jane. "Sexual Harassment: It Can Happen Here." AGB Reports 32, no.1 (Jan.-Feb. 1990): 15-20.
- Dziech, Billie W., and Linda Weiner. The Lecherous Professor: Sexual Harassment on Campus. 2d ed. Chicago: University of Illinois Press, 1990.
- Etzioni, Amitai. "Administrative and Professional Authority." In ASHE Reader on Organization and Governance in Higher Education ed. Marvin W. Peterson, 3d ed., 28-35. Needham Heights, Mass.: Ginn Press and Simon and Schuster. 1985.
- Fechner, Holly B. "Toward and Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts." Journal of Law Reform 23, no.3 (Spring, 1990): 475-505.
- Fitzgerald, Louise A. "Sexual Harassment: The Definition and Measurement of a Construct." In Ivory Power: Sexual Harassment on Campus, ed. Michele Paludi, 21-44. New York: State University of New York Press, 1990.
- Fitzgerald, Louise A., and Lauren Weitzman. "Men Who Harass: Speculation and Data." In Ivory Power: Sexual Harassment on Campus, ed. Michele Paludi, 125-140. New York: State University of New York Press, 1990.
- Fritz, Bonnie Lu. "Legal Decisions Concerning American Institutions of Higher Education and Dismissal of Faculty During the 80s." Ph.D. diss., University of Southern Mississippi, 1988.
- Fuhr, George A. "The Significance of Factors in Judgments by Washington State University Faculty Regarding Levels of Sanctions Appropriate to the Sexual Harassment of Students." Ph.D. diss., Washington State University, 1989.

- Goleman, Daniel. "Sexual Harassment: About Power, Not Sex." New York Times, 23 October 1991, B5, B8.
- Guide to American Law Supplement 1990. New York: West Publishing Co., 1990. S.v. "Sexual Harassment."
- Hartman, Mary A. "Mills Students Provide Eloquent Testimony to the Value of Women's Colleges." Chronicle of Higher Education, 5 July 1990, A-40.
- Harvard Law Review Association. A Uniform System of Citation. 15th ed. Cambridge, Mass.: Gannett House, 1991.
- "Haverford College Commencement." New York Times, 20 May 1991, A-13.
- Helly, Dorothy O. "Institutional Strategies: Creating a Sexual Harassment Panel." In Ivory Power: Sexual Harassment on Campus, ed. Michele Paludi, 231-250. New York: State University of New York Press, 1990.
- Ingulli, Elaine D. "Sexual Harassment in Education." Rutgers Law Journal 18, no.2 (Winter 1987): 281-325.
- Kaplin, William A. The Law of Higher Education 2d ed. San Francisco: Jossey-Bass, 1989.
- Keller, Elisabeth A. "Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy." Journal of College and University Law 15 (1988): 21-42.
- Langevin, Judith B., and Thomas C. Kayser. "Sexual Harassment in Education Institutions." Trial 6 (June 1988): 29-33.
- Leatherman, Courtney. "Stanford Neurosurgeon Decides to Remain at University but Sees Continuing Struggle Against Sex Discrimination." Chronicle of Higher Education, 18 September 1991, A-19, A-20.
- Little, Doric. "An Investigation of the Legal Parameters of Policies Dealing With Sexual Relationships in Academe." Ph.D. diss., University of Hawaii, 1987.
- Little, Doric, and John A. Thompson. "Campus Policies, the Law, and Sexual Relationships." Thought and Action 5, no. 1 (Spring 1989): 17-23.
- MacKinnon, Catherine. Sexual Harassment of Working Women. New Haven: Yale University Press, 1979.

- . Feminism Unmodified: Discourses on Life and Law.
Cambridge: Harvard University Press, 1987.
- Maihoff, Nancy, and Linda Forrest. "Sexual Harassment in Higher Education: An Assessment Study." Journal of National Association of Women Deans, Administrators, and Counselors 42, no.2 (Summer 1983): 3-8.
- Mango, Kimberly A. "Students Against Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972." Connecticut Law Review 23, no.1 (Winter 1991): 355-412.
- Martin, Susan E. "Sexual Harassment, the Link Joining Gender Stratification, Sexuality, and Women's Economic Status." In Women: A Feminist Perspective ed. Jo Freeman, 57-75. Mountain View, Cal.: Mayfield Publishing Co., 1987.
- McCormack, Arlene. "Harassment, Sexual or Otherwise: The Role of Devaluation in Student-Teacher Interaction." Ph.D. diss., Boston University Graduate School, 1981.
- McCormick, Naomi, Susan Adams-Bohley, Susan Peterson, and William Gaeddert. "Sexual Harassment of Students at a Small College." Initiatives 52, no.3 (Fall 1989): 15-24.
- McMillan, James H., and Sally Schumacher. Education: A Conceptual Introduction. 2d ed. Glenview, Ill.: Scott, Foresman, & Co., 1989.
- McMillan, Liz. "Many Colleges Taking a New Look at Policies on Sexual Harassment." Chronicle of Higher Education, 17 December 1986, 1,16.
- Middleton, Lorenzo. "Sexual Harassment by Professors: An Increasingly Visible Problem." Chronicle of Higher Education, 15 September 1980, 1, 14.
- Mouley, George. Educational Research: The Art and Science of Investigation. Boston: Allyn & Bacon, 1977.
- Myers, Carmen L. "Sexual Harassment in Higher Education: A Perceptual Study of Academic Women in a State University System." Ph.D. diss., Florida State University, 1983.
- Olson, Carol, and Kathleen McKinney. "Processes Inhibiting the Reduction of Sexual Harassment in Academe: An Alternative Explanation." Initiatives 52, no.3 (Fall 1989): 7-13.

Oshinsky, Judy C. "Sexual Harassment of Women Students." Ph.D. diss., University of Florida, 1980.

Paludi, Michele, ed. Ivory Power: Sexual Harassment on Campus. New York: State University of New York Press, 1990.

Paludi, Michele, Marc Grossman, Carole Ann Scott, Joni Kindermann, Susan Matula, Julie Ostwald, Judi Dovan, and Donna Malcahy. "Myths and Realities: Sexual Harassment on Campus." In Ivory Power: Sexual Harassment on Campus ed. Michele Paludi, 1-13. New York: State University of New York Press, 1990.

"Power and Leadership." In Stogdill's Handbook of Leadership, ed. Bernard M. Bass, 169-191. New York: Free Press, 1981.

Rabinowitz, Vita C. "Coping with Sexual Harassment." In Ivory Power: Sexual Harassment on Campus, ed. Michele Paludi, 103-118. New York: State University of New York Press, 1990.

Schneider, Beth E. "Graduate Women, Sexual Harassment and University Policy." Journal of Higher Education 58, no.1 (1987): 46-65.

Schneider, Ronna G. "Sexual Harassment and Higher Education." Texas Law Review 65 (1987): 525-583.

Scott, Deborah D. "Sexual Harassment Behaviors, Management Strategies, and Power Dependent Behavior Among a Female Graduate Student Population." Ph.D. diss., Ball State University, 1983.

Shullman, Sandra, and Barbara Watts. "Legal Issues." In Ivory Power: Sexual Harassment on Campus, ed. Michele Paludi, 251-263. New York: State University of New York Press, 1990.

Smith, Margaret D. "Must Sexual Harassment Be a Hands On Experience? Sexual Harassment by Professors." West's Education Law Reporter 28 (1986): 693-707.

Streibeigh, Fred. "Defining Law on the Feminist Frontier." New York Times Magazine, 6 October 1991, sec.6, 29-31, 52-56.

Terpstra, David E., and Douglas D. Baker. "Outcomes of Sexual Harassment Charges." Academy of Management Journal 31, no.1 (1988): 185-194.

- Till, Frank J. Sexual Harassment: A Report on the Sexual Harassment of Students. Washington, D.C.: The National Advisory Council of Women's Educational Programs, 1980.
- Truax, Anne. "Sexual Harassment in Higher Education: What We've Learned." Thought and Action 5, no.1, 25.
- Tushnet, Mark V. The NAACP's Legal Strategy Against Segregated Education. Chapel Hill: University of North Carolina Press, 1987, 10, citing W.E.B. DuBois, "Separation and Self Respect", The Crisis 41 (March 1934): 85.
- "U.S. Ill at ease With All Male VMI." New York Times, 4 April 1991, A-10.
- Vacca, Richard C., and H. C. Hudgins, Jr. Liability of School Officials and Administrators for Civil Rights Torts. Charlottesville, Va.: The Mitchie Company, 1982.
- Vhay, Michael D. "The Harms of Asking: Toward a Comprehensive Treatment of Sexual Harassment." University of Chicago Law Review 55 (1988): 328-362.
- Virella, Basilisa. "Incidence, Perception and Attitude Toward Sexual Harassment in Higher Education." Ph.D. diss., University of Wisconsin, 1989.
- Wetherfield, Alison. "Sexual Harassment: The Current State of the Law Governing Educational Institutions." Initiatives 52, no.4 (Winter 1990): 23-27.
- Zalk, Sue R. "Men in the Academy: A Psychological Profile of Harassment." In Ivory Power: Sexual Harassment on Campus, ed. Michele Paludi, 141-175. New York: State University of New York Press, 1990.

LIST OF CASES

- Alexander v. Yale University, 459 F. Supp. 1 (D. Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980).
- Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).
- Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 399 (1971).
- Bougher v. University of Pittsburgh, cert. denied 108 S. Ct. 460 (1987); 713 F. Supp. 139 (W.D. Pa. 1989), aff'd, 882 F.2d 74 (3d Cir. 1989).
- Cannon v. University of Chicago, 441 U.S. 677 (1979).
- Davis v. Passman, 442 U.S. 228 (1979).
- Ellison v. Brady, 924 F. 2d 872 (9th Cir. 1991).
- Franklin v. Gwinnett Co. Public Schools, 911 F.2d 627 (11th Cir. 1990), rev'd , ____ U.S. ____ (1992).
- Grove City College v. Bell, 465 U.S. 555 (1984).
- Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).
- Korf v. Ball State University, 726 F.2d 1222 (7th Cir. 1984).
- Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985), cert. denied, 106 S. Ct. 599 (1986).
- Lipsett v. University of Puerto Rico, 576 F. Supp. 1217 (D. P.R. 1983) (motion to dismiss denied); 637 F. Supp. 789 (D.P.R. 1986) (summary judgment for defendants); and (this case only) sub nom. Lipsett v. Rive-Mora, 669 F. Supp. 1188 (D.P.R. 1987) (summary judgment for defendant); rev'd, 864 F.2d 881 (1st Cir. 1988); 740 F. Supp. 921 (D.P.R. 1990) (expert witness certification denied); 745 F. Supp. 793 (D.P.R. 1990) (University granted sovereign immunity); 759 F. Supp. 40 (D.P.R. 1991) (motion denied for judgment n.o.v.).
- Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

Moire v. Temple University School of Medicine, 613 F. Supp. 1360 (E.D. Pa. 1985), aff'd, 800 F.2d 1136 (3d Cir. 1986).

Naragon v. Wharton, 572 F. Supp. 1117 (M.D. La. 1983); aff'd, 737 F.2d 1403 (5th Cir. 1984).

Rabidue v. Osceola Refinery Co., 805 F.2d 622 (6th Cir. 1986) (Keith, J., dissenting), cert. denied, 481 U.S. 1041 (1987)

Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

BIOGRAPHICAL SKETCH

Ann Browning Masters was born in St. Augustine, Florida, in 1950. She attended Hastings High School in Hastings, Florida, and was graduated in 1968. She then attended the University of Florida in Gainesville, Florida, and, in 1973, received a Bachelor of Arts degree with a major in psychology, graduating with high honors. In 1976, she received the master's and education specialist degrees in Counselor Education, also from the University of Florida.

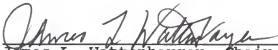
From 1974 until 1977 she was employed, first as Therapy Supervisor, then as Executive Director at the Drug Education and Prevention Center in St. Augustine, Florida. In 1978 she became Consultation and Education Coordinator at Tri-County Mental Health Services in St. Augustine, Florida. From 1981 until 1985 she was employed at the St. Johns County Council on Aging, serving in her last position there as Personnel Coordinator.

From 1978 until the present time she has maintained employment at St. Johns River Community College (SJRCC) based in Palatka, Florida. From 1978 until 1985 she was an adjunct psychology instructor at St. Augustine sites. During 1978, as a consultant, she designed a Women's Center program housed on the main campus. She then served as the

initial Director of the Women's Center, which served all three campuses with a newsletter and community programs. In 1985 she entered full-time employment with SJRCC as a counselor.

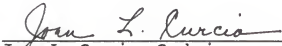
In 1986 she entered the doctoral program of the Education Leadership Department at the University of Florida, Gainesville, Florida. She resides in St. Augustine.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of a scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.



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I certify that I have read this study and that in my opinion it conforms to acceptable standards of a scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.



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Associate Professor of Educational
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Phyllis M. Meek
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I certify that I have read this study and that in my opinion it conforms to acceptable standards of a scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.



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This dissertation was submitted to the Graduate Faculty of the College of Education and to the Graduate School and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

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